

## ARTICLES

### HARSH CREDITOR REMEDIES AND THE ROLE OF THE REDEEMER

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*The concept of the judgment-proof or collection-proof debtor is fundamental to our understanding of civil law and of what distinguishes it from criminal law. But when civil creditors can threaten unduly harsh or cruel debt collection measures (whether legally or not), they extend their reach into the pockets of those whom this Article calls “redeemers,” third parties with a familial or quasi-familial relationship to civil debtors who have reason to pay on their behalf. This Article examines four such measures—imprisonment, homelessness, destitution, and deportation—remedies that sound like they come from another time and place, but which are threatened by some creditors in the United States today.*

*Such “remedies” are problematic because (among other reasons) they undermine a core pillar of civil law: that liability—absent a guarantee—is limited to the defendant. Because harsh creditor remedies can affect third-party redeemers, they also provide a classic example of an externality that justifies nonparentalistic intervention. We should think of this field not as “the law of debtors and creditors,” but as “the law of debtors, creditors, and redeemers.”*

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*The role that redeemers play in debt collection law is one of many instances in which legal institutions display a myopic view of communities: redeemers too often stand outside the field of vision of courts and legislatures. Even so, this theory provides a powerful tool for explaining and reinforcing legal rules ranging from the law of unconscionability to exemption statutes to consumer protection. This Article also recommends several measures to cabin this “spillover” effect, including an argument that imprisonment for civil debt violates not only state bans on debtors’ prisons, but also the federal Due Process Clause (even after Dobbs).*

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#### INTRODUCTION

The quintessential outcome of a civil action against an individual, assuming that the plaintiff prevails, is the money judgment. Yet, as most lawyers learn sometime in their first year of law school, that defendant may be “judgment-proof” or “collection-proof” because they have no assets that the creditor may seize to satisfy the judgment.<sup>1</sup> Students of law who dive deeper into the world of post-judgment debt collection (as all should) may also know that individuals need not be utterly destitute to count as judgment-proof, since state law protects, or “exempts,” certain property from being seized to satisfy debt.<sup>2</sup>

This carefully ordered world falls apart when “harsh creditor remedies” come into play—debt collection measures like *imprisonment*, *homelessness*, *destitution*, and *deportation*. When civil creditors can credibly threaten an individual with such consequences, third parties—like spouses, parents, grandparents, godparents, or children—jump into the breach.

This Article refers to these third parties as *redeemers*, though the term is less a neologism than a traditional label that I hope to resuscitate. Such redeemers offer or lend funds to repay the debt. Redeemers are not cosigners or guarantors of the debt and thus have no legal obligation to repay the debt, but they do have an economic interest in the dispute: harsh creditor measures threaten not only the judgment debtor, but the redeemer as well, due to their cruel and disruptive nature. Indeed, since the four “remedies” discussed here effectively incapacitate the debtor, redeemers may face the prospect of having to care for the debtor or the debtor’s dependents. Other redeemers, such as friends, neighbors, congregants, or community members, may act out of a similar duty when they have a quasi-familial relationship with the debtor or the debtor’s dependents. To borrow from the old common-law rule of subrogation, a redeemer is a person whose interest in repaying the debt would be sufficient to entitle them to a claim of equitable subrogation against the debtor if they were to pay the debt in full.<sup>3</sup> By contrast, a “volunteer”—one

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1. *See Judgment-Proof*, BLACK’S LAW DICTIONARY (11th ed. 2019).

2. Indeed, in some states, like Florida and Texas, individuals can exempt their homestead from the debt collection process with no monetary cap—so long as the homestead sits on an appropriately small acreage. This can allow civil debtors to elude paying their debts despite possessing an asset that makes them fabulously wealthy. *See, e.g.*, TEX. PROP. CODE ANN. § 41.001 (West 2023); FLA. CONST. art. X, § 4. *See generally* ELIZABETH WARREN, JAY LAWRENCE WESTBROOK, KATHERINE PORTER & JOHN A.E. POTTOW, *THE LAW OF DEBTORS AND CREDITORS* 88–89 (7th ed. 2014) (describing uncapped homestead exemptions).

3. Although the doctrine of equitable subrogation varies slightly from state to state, the standard five-prong test is well over fifty years old:

(1) Payment must have been made by the subrogee to protect his own interest. (2) The subrogee must not have acted as a volunteer. (3) The debt paid must be one for

motivated purely by charity—could not claim equitable subrogation.<sup>4</sup> Of course, even though redeemers are entitled to equitable subrogation, they usually do not press that right.

We should think of this field not as “the law of debtors and creditors,” but as “the law of debtors, creditors, and redeemers.” Harsh creditor remedies disrupt the tidy notion of a civil action with a plaintiff and a defendant. Although courts focus on the parties before them, creditors routinely drag in redeemers to provide a sort of shadow guarantee for the debt.

To many readers, this discussion will sound outlandish or archaic, something from another time or another place. And this impression is understandable. After all, Americans banned debtors’ prisons in a wave of abolitionist furor between the 1830s and 1850s.<sup>5</sup> And, as many of us learned from that canonical contracts case, *Williams v. Walker-Thomas Furniture Co.*,<sup>6</sup> courts half a century ago struck down the contractual provisions that the Walker-Thomas Furniture Company used to repossess Ora Lee Williams’s furniture and appliances, appealing to the doctrine of substantive unconscionability.<sup>7</sup> Indeed, as Professor Anne Fleming uncovered, judges issuing those unconscionability opinions shone a spotlight on unsavory and harsh credit practices, allowing legislators to pick up the baton.<sup>8</sup>

Harsh creditor remedies, though, are not extinct. Like an invasive plant species, cruel debt collection measures crop up persistently in twenty-first century America. Consider the following stories.

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which the subrogee was not primarily liable. (4) The entire debt must have been paid. (5) Subrogation must not work any injustice to the rights of others. *Caito v. United Cal. Bank*, 576 P.2d 466, 471 (Cal. 1978) (en banc) (quoting *Grant v. De Otte*, 265 P.2d 952, 955 (Cal. Dist. Ct. App. 1954)).

4. *See, e.g.*, *Hult v. Ebinger*, 352 P.2d 583, 593 (Or. 1960) (en banc) (noting that “when one has a moral duty or at least a moral privilege to pay the debt of another he will be granted the right of subrogation” and “one who furnishes necessities for another is not a ‘volunteer’ and is entitled to be subrogated to that other’s right to recover against any property charged with his support”); Susan Kelly, *Payment of the Debt of Another: Reimbursement by the Discharged Debtor*, 35 LA. L. REV. 683 (1975) (discussing the civil law tradition of equitable subrogation in Louisiana). Moral obligation, by contrast, traditionally does not count as consideration in contract formation. *See generally* *Mills v. Wyman*, 20 Mass. (3 Pick.) 207 (1825). The modern approach to equitable subrogation has sharply narrowed the common-law exception for volunteers. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 24 (AM. L. INST. 2011).

5. *See, e.g.*, Christopher D. Hampson, *The New American Debtors’ Prisons*, 44 AM. J. CRIM. L. 1, 19 (2016) (describing the nationwide movement, beginning in Kentucky, to ban debtors’ prisons).

6. 350 F.2d 445 (D.C. Cir. 1965).

7. *See* Anne Fleming, *The Rise and Fall of Unconscionability as the Law of the Poor*, 102 GEO. L.J. 1383, 1397 (2014).

8. *See id.* at 1424 (“The *Williams* litigation catalyzed a process of local legislative reform to put in place new regulations for installment sales.”). Although Fleming argued that substantive unconscionability had fallen out of use in common-law adjudication, Professor Jacob Hale Russell has challenged that narrative, pointing to numerous areas in which courts rely on unconscionability doctrine to strike down “rotten deals”—not just binding arbitration clauses. *See generally* Jacob Hale Russell, *Unconscionability’s Greatly Exaggerated Death*, 53 U.C. DAVIS L. REV. 965 (2019).

(1). In Indiana, a small claims court sentenced Deidre Carter to serve thirty days in jail for a \$110 housing debt.<sup>9</sup> Carter was disabled, had three children, and had no property or income that could lawfully be seized to repay the debt under Indiana law.<sup>10</sup> Even though the Indiana Constitution states that “there shall be no imprisonment for debt, except in case of fraud,”<sup>11</sup> her landlord, Grace Whitney Properties, sought an order of garnishment, and the court ordered Carter to pay \$10 per month.<sup>12</sup> When she was unable to pay, Grace Whitney Properties began filing contempt motions every few months.<sup>13</sup> The magistrate judge held Carter in contempt of court, remarking to her that she could “purge herself of contempt” if she paid the \$110 that she owed.<sup>14</sup> As the courtroom deputy handcuffed Carter, a stranger in the courtroom gave her \$100 so that she could escape jail.<sup>15</sup> On appeal, the Indiana Court of Appeals struck down the local rules that allowed Grace Whitney Properties to use the contempt power of the court to collect its debt.<sup>16</sup>

(2). In Mississippi, on a rainy day in February 2019, Samantha Conner’s housing manager, accompanied by the constable, arrived at her home to enforce an eviction judgment.<sup>17</sup> Beyond forcing Conner from the apartment, the constable also enforced the landlord’s lien of distress for rent, or distraint, which allowed the landlord to seize Conner’s personal property to satisfy the judgment. According to Conner’s complaint, that property included furniture, appliances, and jewelry, as well as birth certificates, social security cards, and medical prescriptions.<sup>18</sup> Assisted by the Low-Income Housing Clinic at the University of Mississippi School of Law, Conner sued in federal court, arguing that Mississippi’s eviction procedure violated her due process

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9. *Carter v. Grace Whitney Props.*, 939 N.E.2d 630, 633 (Ind. Ct. App. 2010).

10. *Id.* Like all states, Indiana has its own list of exemptions, which includes (among other things) the primary home up to \$15,000, professionally prescribed health aids, retirement accounts, medical care savings accounts, health savings accounts, any earned income tax credit, disability benefits, and other real estate or tangible personal property of \$8,000 (sometimes called a “wildcard” exemption). *See* IND. CODE ANN. § 34-55-10-2 (West 2023).

11. IND. CONST. art. I, § 22.

12. JENNIFER TURNER, ACLU, A POUND OF FLESH: THE CRIMINALIZATION OF PRIVATE DEBT 49 (2018), <https://www.aclu.org/wp-content/uploads/legal-documents/022118-debtreport.pdf> [<https://perma.cc/V5AM-FLAJ>].

13. *Grace Whitney Props.*, 939 N.E.2d at 633.

14. TURNER, *supra* note 12, at 49.

15. *Id.*

16. *Grace Whitney Props.*, 939 N.E.2d at 635; *see also* *Cowart v. White*, 711 N.E.2d 523, 531 (Ind. 1999) (“[B]ecause parties may enforce obligations to pay a fixed sum of money through execution as provided in Trial Rule 69, all forms of contempt are generally unavailable to enforce an obligation to pay money.”); *Pettit v. Pettit*, 626 N.E.2d 444, 447 (Ind. 1993); *State ex rel. Wilson v. Monroe Superior Ct. IV*, 444 N.E.2d 1178, 1180 (Ind. 1983) (“The Indiana Constitution, Article 1, Section 22, prohibits imprisonment for debt. Because she cannot be imprisoned for failure to pay the judgment debt, relator may not be imprisoned for proposing the judgment remain unsatisfied until she obtains attachable assets.”).

17. *See, e.g.*, Second Amended Complaint ¶¶ 23–24, *Conner v. Alltin LLC*, No. 20-CV-00057 (N.D. Miss. June 17, 2020), ECF No. 51.

18. *Id.* ¶ 37.

rights under the U.S. Constitution.<sup>19</sup> The federal court struck down the Mississippi law as unconstitutional and hinted that the Mississippi legislature should amend the law in its next session.<sup>20</sup> Mississippi revised its landlord-tenant law in 2022, providing for clearer notice and more time for removal proceedings.<sup>21</sup>

(3). In Massachusetts and New York, landlords threatened to call U.S. Immigration and Customs Enforcement (ICE) on tenants to induce them to catch up on rent payments. Holly Ondaan, a green card applicant from Guyana, was living in Queens, New York, when she fell behind on rent payments.<sup>22</sup> “HAVE MY MONEY OR I’M CALLING ICES THAT DAY PERIOD,” texted the landlord, who made four calls to immigration authorities trying to figure out how to file a complaint.<sup>23</sup> The New York City Commission on Human Rights pursued the case, and a judge ruled that the landlord had violated the city’s human rights law, recommending a \$5,000 fine and a \$12,000 damage payment to Ondaan.<sup>24</sup> Similarly, Rogelio Gonzalez, an undocumented immigrant from Guatemala, reported poor and unsanitary conditions to the municipal government in Lynn, Massachusetts and began withholding rent on account of those conditions.<sup>25</sup> The landlord threatened to call ICE, and three months later ICE agents arrived and arrested one of the tenants.<sup>26</sup>

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19. *See Landlord Evicts Tenant, Keeps Everything—Even Her Vaseline*, UNIV. MISS. SCH. L. (Dec. 15, 2020), <https://law.olemiss.edu/landlord-evicts-tenant-keeps-everything-even-her-vaseline/> [https://perma.cc/3H74-D7FY]. The Low-Income Housing Clinic brought two similar cases against Alltin LLC and other defendants. In all three cases, the debtors, along with redeemers, offered funds to their landlords, but the landlords refused the money. *See* Amended Complaint ¶¶ 19, 26–27, 32, 44, *Lashley v. Alltin LLC*, No. 21-CV-00238 (N.D. Miss. Feb. 19, 2022), ECF No. 15 (alleging that the debtor and various family members offered to repay the debt); Third Amended Complaint ¶¶ 21, 26–27, 50–51, *Patmon v. Tinree LLC*, No. 21-CV-00174 (N.D. Miss. June 14, 2022), ECF No. 52 (same).

20. *Conner*, 571 F. Supp. 3d at 547–48, 548 n.1.

21. *See* S.B. 2461 §§ 3, 5, 2022 Leg., Reg. Sess. (Miss. 2022); *Mississippi Revises Eviction Law That Judge Called “Absurd,”* AP (May 15, 2022, 9:16 AM), <https://apnews.com/article/mississippi-tate-reeves-statutes-c996b67fd535c0f92a2ccb4a1388d519> [https://perma.cc/8HAF-UDXM].

22. Christina Goldbaum, *Threat to Report Tenant to ICE May Cost Landlord \$17,000*, N.Y. TIMES (Sept. 23, 2019), <https://www.nytimes.com/2019/09/23/nyregion/immigrants-tenants-rights.html> [https://perma.cc/M7YY-TYQX]; Tyler Blint-Welsh, *New York Judge Fines Landlord \$17,000 for Threatening to Call ICE on Tenant*, WALL ST. J. (Sept. 19, 2019, 6:10 PM), <https://www.wsj.com/articles/new-york-judge-fines-landlord-17-000-for-threatening-to-call-ice-on-tenant-11568931010> [https://perma.cc/AWJ6-Q6PR].

23. Goldbaum, *supra* note 22.

24. *Id.*

25. Chloe Gotsis, *AG Healey Sues Lynn Landlord for Intimidating Tenants and Threatening to Report Them to Immigration Authorities*, MASS.GOV: OFFICE ATT’Y GEN. (Mar. 17, 2021), <https://www.mass.gov/news/ag-healey-sues-lynn-landlord-for-intimidating-tenants-and-threatening-to-report-them-to-immigration-authorities> [https://perma.cc/MCW4-UBZH].

26. Simón Rios, *Lynn Tenant to Turn Himself in to Immigration Authorities, Following Alleged Threat by Landlord*, WBUR (Oct. 23, 2020), <https://www.wbur.org/news/2020/10/23/lynn-ice-landlord-rent-dispute-hearing?linkId=102711224> [https://perma.cc/3Y4A-DEG8].

This is not the first time that I have written about harsh sanctions that are wrong for many reasons.<sup>27</sup> Such stories shock the conscience. It offends our basic sense of morality that a civil creditor could have their debtor imprisoned, impoverished, kicked to the curb, or kicked out of the country.

And indeed, scholars have offered several reasons why government should forbid unduly harsh or cruel creditor remedies. There is, of course, the boldly parentalistic<sup>28</sup> camp, which posits that the state may know better than the parties to the contract what is in their best interests.<sup>29</sup> In staunch opposition, scholars following the economic analysis of law typically oppose parentalistic justifications for legal rules.<sup>30</sup> Yet scholars like Professor Eric Posner have argued that because the state has a strong interest in keeping debtors off the welfare rolls, it has good reason not to use its resources to allow remedies that would impoverish debtors.<sup>31</sup> Such a rationale, Posner argues, is not parentalistic because it relies on the state's own preferences without overriding the parties' preferences.<sup>32</sup> That argument fits neatly into the ongoing "privatization of dependency" that has been unfolding since the mid-1970s, as recounted by Professor Brenda Cossman.<sup>33</sup>

Others, by contrast, have used a deontological lens. Professor Seana Shiffrin construes enforcement of contractual provisions as an affirmative choice by the community, pointing out that "[t]he state has at least a permission and perhaps a deontological commitment not to assist grossly unfair treatment of one of its citizens by another."<sup>34</sup>

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27. See generally Christopher D. Hampson, Note, *State Bans on Debtors' Prisons and Criminal Justice Debt*, 129 HARV. L. REV. 1024 (2016); Hampson, *supra* note 5.

28. Following several scholars in the field, I use the gender-neutral word "parentalism," since the law-and-economics discussion has nothing to do with gender but rather the state's restriction of choice. See Stephen J. Ware, *Paternalism or Gender-Neutrality*, 52 CONN. L. REV. 537, 591–603 (2020).

29. For a full-throated defense of this position, see generally SARAH CONLY, *AGAINST AUTONOMY: JUSTIFYING COERCIVE PATERNALISM* (2013).

30. Professor Anthony T. Kronman noted that "nondisclaimable" contract rules "appear[] indefensible from an economic point of view," while discussing exceptions based on fraud or misrepresentation. Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763, 767 (1983); see also, e.g., Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 603 (1982) ("Given a choice, almost everyone seems to prefer to cast a difficult rule change proposal in [efficiency] terms rather than in those of paternalism or redistribution."); Eric A. Posner, *Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract*, 24 J. LEGAL STUD. 283, 297–98 (1995) (noting that it is "hard to find defenders of [parentalism] in the academic literature").

31. See generally Posner, *supra* note 30.

32. *Id.* at 297.

33. Brenda Cossman, *Contesting Conservativisms, Family Feuds and the Privatization of Dependency*, 13 AM. U. J. GENDER SOC. POL'Y & L. 415, 441–43 (2005) (noting the longstanding connection in conservative thought between welfare reform and child support obligations). This trend stems from and extends the much longer pattern of privatization in family law more generally. See generally Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443.

34. Seana Valentine Shiffrin, *Paternalism, Unconscionability Doctrine, and Accommodation*, in 29 PHIL. & PUB. AFFS. 205, 235 (2000).

This Article takes the discussion of harsh creditor remedies in a previously unexplored direction. Although prior scholarship has focused on the debtor, or on the relationship between the debtor and the state, this Article argues that the legal and moral commitments of third parties—redeemers—provide another reason for the state to ban harsh creditor remedies. Cruel debt collection measures induce redeemers, who are third parties with an economic stake in the dispute, to pitch in and contribute to debt repayment efforts. In doing so, harsh remedies undercut not only property exemption law and state welfare policy, but also the very foundation of civil law.

To be sure, many of these harsh creditor remedies are already unlawful. This Article catalogues those justifications and adds a new one: the Due Process Clause of the U.S. Constitution prohibits imprisonment for civil debt.<sup>35</sup> Indeed, imprisonment for civil debt violates even the narrower test for substantive due process rights set forth in *Dobbs v. Jackson Women's Health Organization*.<sup>36</sup>

This Article proceeds in four parts. Part I discusses what I am calling “harsh creditor remedies” in greater detail, with four illustrative examples. It also defends the use of the term “remedy” in this context and argues that these remedies erode the boundaries of civil law.

Part II examines why American legal institutions tend to overlook the role of redeemers in our communities, even in laws directly regulating debt collection. Nevertheless, Part II further shows how many of those laws are at least consistent with this framework, even if statutes or court opinions do not expressly discuss redeemers.

Part III digs deeper into why harsh creditor remedies present such an existential challenge to the way that lawyers and lawmakers think about the civil liability system. Part III analyzes the concept of the “redeemer”—someone who has not guaranteed or cosigned the debt but who has an economic stake in the dispute due to their familial or quasi-familial relationship to the debtor or the debtor’s dependents. It then lists several potential standards for what might count as an unduly harsh creditor remedy and explains which test is best.

Part IV proposes several different measures that the legal community should take to address harsh creditor remedies and prevent the erosion of a fundamental feature of our legal system.

## I. THE DEATH OF LIMITED LIABILITY

The consequences of civil liability have long distinguished American civil law from criminal law.<sup>37</sup> Unlike criminal sanctions, civil liability typically

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35. See *infra* Part IV.B.1.b.

36. 142 S. Ct. 2228 (2022).

37. See, e.g., Alexandra Natapoff, *Criminal Municipal Courts*, 134 HARV. L. REV. 964, 1039 (2021) (quoting 9A EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 27:6, Westlaw (database updated Aug. 2020)) (noting that if the penalty includes incarceration, the offense is criminal); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089,



results in a monetary judgment. Those monetary judgments run against the person and their property, subject to exemption laws and restrictions on garnishment. As a result, civil liability almost never reduces debtors to ashes because debtors can preserve a good deal of personal property (and indeed, in jurisdictions like Texas and Florida, debtors can shield millions of dollars of wealth from creditors).<sup>38</sup> But in various pockets across the country, poor and low-income Americans face creditor sanctions in civil cases that mirror or resemble criminal sanctions.

This Article examines four such “remedies”: *imprisonment, homelessness, destitution, and deportation*.<sup>39</sup> To be sure, these outcomes are not “remedies” in the traditional, common-law sense, although imprisonment for civil debt was once a remedy in civil cases. Still, they are the practical and often intended effects of remedies that creditors can and do invoke in the effort to collect debt. Indeed, for some creditors, these remedies are part of their business model. Yet, as a civil sanction, each remedy is inherently harsh or can be carried out under circumstances that make it so. Each shares a resemblance to cross-collateralization, that debt collection tactic made famous by the seminal case of *Williams v. Walker-Thomas Furniture Co.*<sup>40</sup> More importantly, each of these remedies incapacitates the debtor in a legal or economic sense, affecting the debtor and the debtor’s dependents and creating a ripple effect through their community.

I have written previously about debtors’ prisons in the context of criminal legal financial obligations, or “LFOs.”<sup>41</sup> Although the moral consensus has turned sharply—and correctly—against such debtors’ prisons,<sup>42</sup> I fear that I

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1124–27 (1972) (arguing that “we impose criminal sanctions as a means of deterring future attempts to convert property rules into liability rules”).

38. See *supra* note 2 and accompanying text.

39. Other examples exist, but these four examples provide a helpful set for purposes of this Article. See, e.g., Nina Bernstein, *To Collect Debts, Nursing Homes Are Seizing Control over Patients*, N.Y. TIMES (Jan. 25, 2015), <https://www.nytimes.com/2015/01/26/nyregion/to-collect-debts-nursing-home-seizing-control-over-patients.html> [<https://perma.cc/7WLS-WUPK>].

40. As detailed by Fleming, Judge J. Skelly Wright’s decision shone a spotlight on a practice that was subsequently banned. See Fleming, *supra* note 7. Congress later banned cross-collateralization in the 1978 adoption of 11 U.S.C. § 522(f)(1)(B) and in 16 C.F.R. § 444.1 (2004).

41. See, e.g., Hampson, *supra* note 5; Hampson, *supra* note 27.

42. In the criminal context, the U.S. Court of Appeals for the Eleventh Circuit addressed these issues in *Teagan v. City of McDonough*, 949 F.3d 670 (11th Cir. 2020). Ziahonna Teagan was arrested in Georgia for driving without insurance and sentenced to a fine of \$745 plus a \$50 penalty for being late to court. *Id.* at 673. When she told the judge that she was unable to pay, the judge sentenced her to sixty days in jail, suspended on the condition that she pay the fine. *Id.* Although the Eleventh Circuit’s majority opinion remanded the case for further proceedings related to Teagan’s false imprisonment claim, Judge Adalberto Jordan’s concurrence emphasized that the municipal court violated federal law by imprisoning Teagan without conducting an ability-to-pay analysis. See *id.* at 680–84 (Jordan, J., concurring). Courts have made parallel advances in the civil context. See, e.g., *Pease v. Charlotte Hungerford Hosp.*, 157 A.3d 1125, 1132 (Conn. 2017) (“Connecticut is one of a handful of states that have not adopted a constitutional amendment prohibiting debtors’ prisons. Nevertheless . . . the history and public policy rationales that have led our sister courts to bar the use of the contempt power to enforce ordinary monetary judgments counsel the same result

was too sanguine about sanctions like imprisonment in civil cases, calling them “rare,”<sup>43</sup> while only briefly mentioning concerns raised by Professors Jayne S. Ressler and Lea Krivinskas Shepard.<sup>44</sup> Of course, such practices are disturbing and worthy of attention even if they are rare. Yet organizations like the American Civil Liberties Union (ACLU) have continued to shine a spotlight on imprisonment for civil debt and similar practices.<sup>45</sup>

Harsh creditor remedies have the potential to erode the boundaries of civil law. Liability is not meant to spill from person to person without legal reason. Doctrines like limited liability and entity shielding define the pockets of property that are available to creditors.<sup>46</sup> Those doctrines, however, can be evaded or eroded. In 1996, Professor Lynn LoPucki set forth his “death of liability” thesis, describing how wealthy individuals and corporations can permanently and irrevocably defeat the liability system through various maneuvers, including by operating through limited-purpose corporations.<sup>47</sup> As LoPucki pointed out, liability is “merely symbolic” unless it can be

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here.”). Journalists, advocates, and legal scholars continue to write on this topic. *See, e.g.*, Tim Curry, *Why Are We Still Sending People to Jail for Being Poor?: It’s Time to Truly Abolish Debtors’ Prisons*, 48 HUMAN RIGHTS 2 (2023); *see also, e.g.*, David Angley, *Modern Debtors’ Prison in the State of Florida: How the State’s Brand of Cash Register Justice Leads to Imprisonment for Debt*, 21 BARRY L. REV. 179, 192–93 (2016) (proposing various fixes to debtors’ prisons in Florida); Matthew Shaer, *How Cities Make Money by Fining the Poor*, N.Y. TIMES (Jan. 8, 2019), <https://www.nytimes.com/2019/01/08/magazine/cities-fine-poor-jail.html> [<https://perma.cc/GT2B-YW6Q>]. This wave includes the incisive argument by Professor Beth A. Colgan that debtors’ prisons violate the Excessive Fines Clause. *See* Beth A. Colgan, *The Excessive Fines Clause: Challenging the Modern Debtors’ Prison*, 65 UCLA L. REV. 2 (2018). The scope of the Excessive Fines Clause may extend to private actors acting on behalf of the government. Although a “fine” is traditionally limited to “amends, pecuniary punishment[s], or recompense for an offence committed against the King and his laws,” this “to a sovereign” limitation results from a limited review of English history. Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277, 300–01 (2014). As Colgan argues, colonial practice shows that “fines” were also implemented by “nongovernmental actors.” *Id.* at 302–06.

43. *See* Hampson, *supra* note 5, at 25.

44. *See* Jayne S. Ressler, *Civil Contempt Confinement and the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005: An Examination of Debtor Incarceration in the Modern Age*, 37 RUTGERS L.J. 355, 356–57 (2005) (expressing concerns with indefinite jail sentences, lack of uniform standards and procedural due process, judicial punitiveness, and ballooning interest); Lea Krivinskas Shepard, *Creditors’ Contempt*, 2011 BYU L. REV. 1509, 1539–40 (describing the normative harms of imprisonment for civil debt).

45. *See, e.g.*, TURNER, *supra* note 12.

46. Professors Henry B. Hansmann and Reinier H. Kraakman famously theorized entity shielding in 2000. *See generally* Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387 (2000); Henry Hansmann, Reinier Kraakman & Richard Squire, *Law and the Rise of the Firm*, 119 HARV. L. REV. 1335 (2006) (examining the historical development of entity shielding).

47. *See generally* Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1 (1996); Danielle D’Onfro, *Limited Liability Property*, 39 CARDOZO L. REV. 1365 (2018) (arguing that security interests are really a form of limited liability property and that treating them as such can allow lawmakers to promote coherence and efficient outcomes). In 2006, Professor Stephen G. Gilles made a similar analysis for individuals. *See* Stephen G. Gilles, *The Judgment-Proof Society*, 63 WASH. & LEE L. REV. 603 (2006).

enforced.<sup>48</sup> This Article uncovers the converse phenomenon among the very poor: creditors can defeat the limited nature of liability through remedies that effectively compel redemption from the debtor's family, friends, and community.<sup>49</sup>

### A. *Four Harsh Creditor Remedies*

#### 1. Imprisonment

Despite the fact that debtors' prisons were abolished as a formal remedy more than a century ago,<sup>50</sup> civil creditors can still credibly threaten imprisonment by invoking the court's contempt power. As detailed by Shepard, creditors can employ supplementary proceedings in their search for nonexempt assets, such as requiring the debtor to appear and provide information about their assets (sometimes called "payment review") or seeking an order to turn over specific, nonexempt assets.<sup>51</sup> If the debtor does not appear for the hearing or examination, the creditor can ask the court to hold the debtor in contempt of court. That contempt order, in turn, results in the issuing of a warrant for the debtor's arrest.

Where the rules provide for supplementary proceedings and the debtor willfully fails to pay or appear, courts have the right to enforce the rules through civil or criminal contempt. Yet in many places, courts appear to operate more like debt collectors, whether by ordering repayment<sup>52</sup> or using

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48. LoPucki, *supra* note 47, at 4 ("To hold a defendant liable is to enter a money judgment against the defendant. Unless that judgment can be enforced, liability is merely symbolic.")

49. The phenomenon of harsh creditor remedies and redemption shares a structural resemblance to how criminal sanctions and surveillance have a disruptive and devastating effect not only on criminal defendants, but also on overpoliced communities in general—which, in this country, creates a disproportionate burden on communities of color. *See, e.g.*, MITALI NAGRECHA, MARY FAINSDOD KATZENSTEIN & ESTELLE DAVIS, CTR. FOR CMTY. ALTERNATIVES, *WHEN ALL ELSE FAILS, FINING THE FAMILY* (2019); Pil H. Chung & Peter Hepburn, *Mass Imprisonment and the Extended Family*, 5 SOCIO. SCI. 335 (2018); Richard Delgado & Jean Stefancic, *Critical Perspectives on Police, Policing, and Mass Incarceration*, 104 GEO. L.J. 1531, 1533–34, 1533 n.8 (2016) (collecting sources); MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 80–84 (2012). Indeed, redeemers may also play a role in the criminal law. As Professor Brendan Roediger recounts, the first words he heard in a municipal court were, "What are you still doing here? Are you telling me nobody loves you enough to come up with two hundred dollars?" Brendan D. Roediger, *Abolish Municipal Courts: A Response to Professor Natapoff*, 134 HARV. L. REV. F. 213, 213 (2021); *see also* Neil L. Sobol, *Criminal Justice Debt and the Return of Debtors' Prisons*, in *OPPRESSED BY DEBT* 69, 77–78 (Saul Schwartz ed., 2021) (noting that "[c]reditors often used incarceration of debtors as a method to encourage payment from debtors' families and friends").

50. *See* Hampson, *supra* note 5, at 19.

51. *See* Shepard, *supra* note 44, at 1524–25. States created supplementary proceedings in the mid-nineteenth century as part of the merger of law and equity. *Id.* In one court, debtor's examinations are conducted off the record, in the hallway outside the courtroom. *See id.* at 1533 & n.122.

52. *See id.* at 1509.

bond money to repay creditors.<sup>53</sup> Consider the following colloquy in *Button v. James*:<sup>54</sup>

**The Court:** So we're here today for you to explain what you're going to do to pay this off.

**Mr. Button:** I can't.

**The Court:** Okay, but you're going to.

**Mr. Button:** I can't do it.

**The Court:** Okay, Mr. Button.

**Mr. Button:** Yes, Ma'am.

**The Court:** For some reason we're not communicating. Alright, you're not hearing me for some reason. I am telling you that, yes, you will. You're going to tell me how you're going to go about doing that. And I'm not going to accept that I cannot, and if the next words out of your mouth are I cannot, Mr. Button, then you'll set [sic] with Mr. Glenn at the Sheriff's Department until you find a way that, yes, you can. So what kind of payments can you make to pay this down?

**Mr. Button:** Five dollars (\$5.00) a month.

**The Court:** Five dollars (\$5.00) a month is—I'm going to be an old woman before this is ever paid off.

**Mr. Button:** That's what I can afford, ma'am. I live on social security disability. I've got to pay my rent and my lights and my gas.

**The Court:** I'm going to order you pay twenty-five dollars (\$25.00) a month until this is paid off. I'm going to show that we are to come back March 12, at 1 o'clock, at which time Miss James is going to tell me that she has already received fifty dollars (\$50.00) towards this. Okay.<sup>55</sup>

This phenomenon has been exhaustively documented across the country. A 2018 ACLU report examined more than 1,000 cases in which civil court judges issued arrest warrants for debtors, finding examples in twenty-six states, from Massachusetts to Idaho.<sup>56</sup> In Washington, a creditor repossessed a father's pickup truck and sold it, but the sale price was not enough to repay the full debt, so the court issued a subpoena directing him to attend a hearing about the deficiency.<sup>57</sup> When the man failed to appear, the police arrested him at home and kept him in the police car for over an hour, "watching in horror as his son sobbed and ran, scared and confused, in and out of their home."<sup>58</sup>

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53. See *infra* Part IV.A.1 (discussing unjust enrichment).

54. 909 N.E.2d 1007 (Ind. Ct. App. 2009).

55. *Id.* at 1008.

56. TURNER, *supra* note 12, at 4.

57. Chrystin Ondersma, *Small Debts, Big Burdens*, 103 MINN. L. REV. 2211, 2221 (2019).

58. TURNER, *supra* note 12, at 19.

## 2. Homelessness

Of course, creditors cannot lawfully force debtors onto the streets without court process. Both renter-debtors and homeowner-debtors, however, face harsh creditor remedies that can effectively deprive them of their homes in short order.

For a renter, when a landlord threatens a tenant with eviction (a formal remedy for unpaid debt), the landlord is not entitled to throw the tenant out or change the locks. Instead, the landlord must commence a legal action to win a judgment for possession of the property and, eventually, eviction.<sup>59</sup> Even in cases in which this procedure takes place relatively quickly, the family will have several weeks from notice of the forthcoming lawsuit, or the “notice to quit,” until the sheriff arrives to enforce the judgment.<sup>60</sup> That timeframe provides a window to move or to find money to repay the debt, a welcome opportunity for tenants in arrears. As Professor Matthew Desmond documented in his 2016 book *Evicted*, tenants frequently reach out to family members, friends, and churches for help paying rental arrears.<sup>61</sup>

But a window for redemption is not how many of these cases end. As Professor Nicole Summers details in a study of the Northeast Housing Court in Massachusetts, landlords and tenants frequently strike deals in court hallways to sign “predrafted settlements.”<sup>62</sup> Such an agreement for judgment allows the tenant to continue living on the property but does not reinstate the lease or dismiss the case—it is a concession that the landlord has won the case.<sup>63</sup> Thus, upon any default by the tenant, the landlord may pick the case back up at the execution stage. After an agreement for judgment, eviction can follow as quickly as a week or two after default, a phenomenon that Summers describes as a form of “civil probation.”<sup>64</sup>

Summers discovered that when civil probation cases returned to housing court after default, judges granted execution on motion 96 percent of the time.<sup>65</sup> Motions, however, are subject to loosened notice and procedural

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59. See, e.g., *Evictions 101: The Eviction Process: How It Works and What to Know*, NAT'L LOW INCOME HOUSING COAL. (Feb. 24, 2022), <https://nlihc.org/resource/evictions-101-eviction-process-how-it-works-and-what-know> [<https://perma.cc/K7DJ-K37B>] (explaining the process of eviction proceedings, which includes notice from the landlord, summons to the court, and a court hearing and decision from the judge to enter a judgment of possession or order of eviction).

60. See, e.g., MASS. UNIF. SUMMARY PROCESS R. 3, 7 (providing for an answer and discovery prior to trial in summary process cases).

61. See MATTHEW DESMOND, *EVICTED* 63 (2016) (“But [the landlord] was betting that Arleen could put in a few calls to family members or non-profit agencies.”); *id.* at 121, 124 (noting that poor tenants learned not to ask their wealthier family members for help); *id.* at 127 (describing tenant who asked a pastor for help).

62. Nicole Summers, *Civil Probation*, 75 STAN. L. REV. 847, 859 (2023).

63. *Id.* at 870.

64. *Id.* at 851.

65. *Id.* at 886. Indeed, the vast majority of eviction orders were decided on motion, not after a trial. *Id.* at 887.

rules and, unlike the original complaint, do not come with discovery rights.<sup>66</sup> Eviction on motion produces what Summers calls “trial by ambush.”<sup>67</sup>

Whether under the summary rules or in the “shadow legal system” described by Summers, landlords can credibly threaten eviction within the week. The speed of that eviction can make it impossible for an individual or family to find a new home: a remedy that is tantamount to homelessness.<sup>68</sup>

For a homeowner, the security of holding title to the property provides some protection from being cast onto the streets. Even so, failure to pay local or state taxes can lead to foreclosure (another formal remedy), a procedure fraught with problems.<sup>69</sup> Until 2023, some jurisdictions allowed for local governments to acquire the property by strict foreclosure, sell the property, and keep the surplus. This was the plight faced by Geraldine Tyler, who racked up a tax debt of \$15,000 and lost a \$40,000 home to Hennepin County in Minneapolis, without seeing a penny of the surplus.<sup>70</sup> In 2022, the U.S. Supreme Court held that the windfall to Minnesota was an unconstitutional taking.<sup>71</sup>

### 3. Destitution

Under the common law, a landlord has a right to seize a tenant’s personal property as payment for rent arrearages through a writ of distress, also called *distrain*.<sup>72</sup> Some U.S. states codified this right either through writs of distress or by allowing a landlord to obtain a lien of distress for rent.<sup>73</sup> Samantha Conner in Mississippi experienced this remedy firsthand, when the sheriff, shoulder-to-shoulder with Conner’s landlord, blocked her from picking up her possessions.<sup>74</sup>

66. *Id.* at 890.

67. *Id.* (quoting Jay Tidmarsh, *Opting Out of Discovery*, 71 VAND. L. REV. 1801, 1819 (2018)).

68. *See, e.g.*, Daphna Lewinsohn-Zamir, *In Defense of Redistribution Through Private Law*, 91 MINN. L. REV. 326, 382 (2006) (“The goal of restrictions on eviction is to prevent the grave, negative effects on people’s welfare caused by *immediate* eviction.”); *see also* Joseph William Singer, *Something Important in Humanity*, 37 HARV. C.R.-C.L. L. REV. 103, 107 (2002) (“Respect for human dignity . . . may justify a rule protecting tenants from eviction without a court proceeding ensuring that the landlord is legally entitled to the eviction. Requiring the landlord to use court-supervised evictions also ensures that the tenant has sufficient time to move.”).

69. *See generally* JOHN RAO, NAT’L CONSUMER L. CTR., THE OTHER FORECLOSURE CRISIS: PROPERTY TAX LIEN SALES (2012), <https://www.nclc.org/wp-content/uploads/2022/09/tax-lien-sales-report.pdf> [<https://perma.cc/4DVQ-36SN>].

70. *See* Tyler v. Hennepin Cnty., 143 S. Ct. 1369, 1373 (2023).

71. *Id.* at 1380 (2023) (“A taxpayer who loses her \$40,000 house to the State to fulfill a \$15,000 tax debt has made a far greater contribution to the public fisc than she owed.”).

72. *See* *Distress*, LEGAL INFO. INST., <https://www.law.cornell.edu/wex/distress> [<https://perma.cc/DZ3L-8JYN>] (last visited Nov. 3, 2023).

73. *See, e.g.*, FLA. STAT. § 83.12, 83.08 (2023).

74. *See supra* notes 17–18 and accompanying text; Anna Wolfe, ‘All of This Is Mine’: In Mississippi, Landlords Legally Snatch All Belongings from Tenants During an Eviction, MISS. TODAY (Mar. 17, 2021), <https://mississippitoday.org/2021/03/17/all-of-this-is-mine-in-mississippi-landlords-legally-snatch-all-belongings-from-tenants-during-an-eviction/> [<https://perma.cc/8CL3-Q85M>]; *see also* MISS. CODE ANN. § 89-7-51 (2023) (providing for a

Distrain has long been understood as unduly harsh.<sup>75</sup> Many state legislatures abolished the remedy, and other state courts found that it violated due process, usually because of lack of appropriate notice.<sup>76</sup> Congress made such liens unenforceable in bankruptcy.<sup>77</sup>

It is easy to see why distrain is disfavored. This Article refers to this remedy as *destitution* because a lien of distress for rent attaches to all personal property located on the premises, which usually will be almost everything the debtor owns. Put differently, distrain allows a landlord to seize, sell, or junk much more property than the Walker-Thomas Furniture Company could ever have hoped to repossess from Ora Lee Williams.

#### 4. Deportation

More than eleven million undocumented immigrants are estimated to live in the United States, accounting for over 3 percent of the total population.<sup>78</sup> The underlying legal liability faced by this population is not a siloed situation, but something that cuts through American life and communities at every turn. No scholar, legislator, or judge (of which I am aware) has suggested that deportation is a proper debt collection device. It is a remedy, but not in a civil action brought by a private plaintiff. And yet, as detailed above, reports abound of creditors, especially landlords, threatening undocumented immigrants with deportation if they do not pay up.<sup>79</sup>

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lessor's lien on personal property); *id.* § 89-7-35(2) (providing for the issuance of a warrant for tenant's removal). Mississippi landlords are not entitled to self-help remedies and must work with the constable to enforce their lien. *See Bender v. N. Meridian Mobile Home Park*, 636 So. 2d 385, 388–89 (Miss. 1994).

75. *See, e.g., Bagwell v. Jamison*, 25 S.C.L. (Chev.) 249, 253 (1840) (per curiam) (“The remedy by distress is a rigorous proceeding, often harsh in its operation, not congenial to the spirit of our institutions and government, and not to be extended beyond the clear and settled limits, except by express enactments of the Legislature.”). *See generally* Gerald Korngold, *Can Distrain Stand Up as a Landlord's Remedy?*, 5 REAL EST. L.J. 242 (1977) (discussing case law cutting back on the use of distrain or finding it unconstitutional).

76. Georgia, for example, requires a hearing before the court can issue a writ of distrain to the landlord. *See* GA. CODE ANN. §§ 44-7-70 to -77 (2023).

77. *See* 11 U.S.C. § 545(3)–(4) (providing that the trustee in bankruptcy may avoid the fixing of a lien of distress for rent).

78. *See, e.g.,* Elaine Kamarck & Christine Stenglein, *How Many Undocumented Immigrants Are in the United States and Who Are They?*, BROOKINGS (Nov. 12, 2019), <https://www.brookings.edu/policy2020/votervital/how-many-undocumented-immigrants-are-in-the-united-states-and-who-are-they/> [<https://perma.cc/VD2S-JD4M>].

79. *See supra* notes 22–26 and accompanying text. *But see* MED.-LEGAL P'SHIP BOS., WORRIED ABOUT LANDLORD RETALIATION AGAINST IMMIGRANTS?, [https://www.cityofboston.gov/images\\_documents/Legal\\_tcm3-35555.pdf](https://www.cityofboston.gov/images_documents/Legal_tcm3-35555.pdf) [<https://perma.cc/F855-HGAV>] (noting that landlords face a risk of liability for accepting rent from undocumented immigrants and reporting that a consortium of Massachusetts tenant rights organizations rarely or never receive complaints).

*B. A Sober yet Diligent Look*

Harsh creditor remedies are far too common for comfort. But do they really amount to a legal phenomenon that could fairly be called the “death” of limited liability?

The phrase is not intended to suggest an irreversible trend. Rather, its purpose is to call attention to a crucial sociolegal problem. Harsh creditor remedies are indeed where limited liability meets its end. As detailed in Part II, harsh creditor remedies erode the foundations of civil law by inducing or compelling third-party payments on debt. True, the phenomenon appears to be concentrated among poor and low-income debtors. But this is unsurprising, since the creditors of wealthy Americans can look to collateral or recourse against the personal assets of their debtors. If the protection of limited liability is crumbling anywhere, it will be among the poor.<sup>80</sup>

The rejoinder that many of these harsh creditor remedies are illegal, wielded unlawfully, or merely threatened provides cold comfort. Too often legal actors and institutions fail to uphold the law, while individuals do not have legal counsel or have limited access to justice. One might suppose that a debtor could simply file for bankruptcy, which would provide an automatic stay against collection actions and ultimately result in a discharge of their debts. Bankruptcy can be expensive, though, and both consumers and businesses frequently need to save up for it.<sup>81</sup> Further, the bankruptcy stay and discharge do not always leave debtors in a stable situation. Bankruptcy, for example, typically pauses eviction actions for only a short period of time.<sup>82</sup> Moreover, some debtors may be unaware that they can file for

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80. The dizzying array of corporate forms arranged by most large corporations to cabin liability only occurs at a sufficient level of wealth. *See* LoPucki, *supra* note 47, at 19–30. The “secured debt” strategy detailed by LoPucki is used “primarily by small, relatively uncreditworthy businesses.” *Id.* at 14. Conversely, compelled redemption only occurs at a sufficient level of poverty.

81. *See generally* Ronald J. Mann & Katherine Porter, *Saving Up for Bankruptcy*, 98 GEO. L.J. 289 (2010). The costs of bankruptcy include legal representation, especially in a procedural maze that is perilous to navigate pro se. *See* Rafael I. Pardo, *Taking Bankruptcy Rights Seriously*, 91 WASH. L. REV. 1115, 1119–20 (2016); Rafael I. Pardo, *Self-Representation and the Dismissal of Chapter 7 Cases*, in BEYOND ELITE LAW: ACCESS TO CIVIL JUSTICE IN AMERICA 87, 90–91 (Samuel Estreicher & Joy Radice eds., 2016). Indeed, some debtors file for Chapter 13 bankruptcy even when the more appropriate chapter for their financial situation would have been a Chapter 7 bankruptcy—because attorney’s fees and court costs can be paid out of the plan instead of up front. *See generally* Pamela Foohey, Robert M. Lawless, Katherine Porter & Deborah Thorne, “No Money Down” Bankruptcy, 90 S. CAL. L. REV. 1055 (2017).

82. *See* 11 U.S.C. § 362(b)(22)–(23), (l)(a)(3), (m)(a)(3) (providing that a tenant-debtor must certify that she can cure the rent arrearage or the automatic stay will be lifted after a statutorily prescribed period). This feature of the Bankruptcy Code underscores the point that Professor A. Mechele Dickerson made in a set of articles from the early 2000s, arguing that bankruptcy law and reform provide the most relief to an “Ideal Debtor,” a profile that produces racial disparities because it is more readily fit by white people. *See generally* A. Mechele Dickerson, *Race Matters in Bankruptcy*, 61 WASH. & LEE L. REV. 1725 (2004); A. Mechele Dickerson, *Race Matters in Bankruptcy Reform*, 71 MO. L. REV. 919 (2006).



bankruptcy or uncertain whether accessing the court system will jeopardize their ability to remain in the country.<sup>83</sup>

The extent of the harsh creditor remedy problem is difficult to quantify, particularly since much of the action takes place outside of courts and off the record. Even so, the findings of legal aid organizations and investigative journalists, discussed above, suggest that the use of these remedies persists across the country.<sup>84</sup> All told, even if we have not yet quantified the extent of the problem, we have plenty of evidence to characterize it as widespread—and as creating cause for concern.

## II. THE ELUSIVE PRESENCE OF REDEEMERS IN AMERICAN LAW

As we will see, standing behind a debtor is often a redeemer—and creditors frequently use harsh creditor remedies to draw redeemers out, inducing them to repay debt that the debtor cannot. Yet written opinions, statutes, and legislative history tend to focus on only two parties: the creditor and the debtor. That tight lens leads to the standard theoretical narrative, discussed above, of a bilateral arrangement. Values like privacy and autonomy, understandably, come into sharp focus.

That lens should not be surprising: the individual is the atom of the American legal system,<sup>85</sup> and connections between individuals often elude the formal view of our legal institutions. It is part of why legal actors often struggle to solve systemic problems.<sup>86</sup> For example, in a debt collection action, a redeemer would likely not have standing to challenge the debtor's imprisonment, eviction, or deportation for civil debt.<sup>87</sup> Even if the redeemer paid the debt to avoid the harsh creditor remedy, most courts would likely find that such an act did not provide the redeemer with a cause of action against the creditor (unless, as described below, the fact pattern fits a very particular mold).<sup>88</sup>

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83. See Chrystin Ondersma, *Debt Without Relief: An Empirical Study of Undocumented Immigrants*, 68 RUTGERS U. L. REV. 1801 (2016); Chrystin Ondersma, *Undocumented Debtors*, 45 U. MICH. J.L. REFORM 517 (2012).

84. See generally Turner, *supra* note 12; Goldbaum, *supra* note 22; Blint-Welsh, *supra* note 22.

85. Indeed, much of American corporate law is devoted to finding ways to take large groups of people and treat their collective endeavors as if they were accomplished by a single individual—the incorporated business entity. This point demonstrates why the individual is the smallest unit of American legal analysis and not the entity: we create entities to mirror individuals and not the other way around. Plus, a longstanding scholarly *mêlée* in corporate governance focuses on which individuals will control corporate decision-making; the entity, therefore, can (and must) be analyzed through the lens of the individual.

86. See *infra* Part II.D.

87. Consider *Siskin v. Complete Aircraft Servs., Inc.* (*In re Siskin*), 231 B.R. 514 (Bankr. E.D.N.Y. 1999), in which a debtor owed a large sum of money to a creditor. A warrant was issued for the debtor's arrest, and he filed for Chapter 7 bankruptcy. *Id.* at 517. Despite the automatic stay, the debtor was arrested, and his wife paid more than \$40,000 to the creditor to secure his release. *Id.* The court found that the debtor's wife had no standing in bankruptcy court. *Id.* at 519.

88. See *infra* note 184 and accompanying text. Even if the availability of third-party funds came up as part of settlement negotiations, such discussions would be unlikely ever to be made

This part reviews contract law, exemption statutes, and consumer protection law, showing in each instance how redeemers stand just outside the purview of the law. Even so, as shown below, American law has long recognized the importance of dependents in the creditor-debtor context, a half-step toward recognizing the role of third-party payors.

#### A. Contract Law

The first place to look for some legal incorporation of redeemers is the law of unconscionability in contracts. Yet the traditional canon of unconscionability cases<sup>89</sup> reveals no in-depth analysis of third-party payment. Instead, as Posner notes, the cases cluster around four factors: impoverished debtors, consumer goods, default on a credit obligation, and “high interest rate[s] or draconian security terms.”<sup>90</sup> The driving theme of a broader set of cases, shown by a study of 187 unconscionability cases conducted by Professors Larry A. DiMatteo and Bruce Louis Rich, may instead be mutual assent, not third-party payments.<sup>91</sup> That said, the two unconscionability opinions discussed below display some sensitivity to the ways in which harsh creditor remedies can impact third parties.

First, in *State ex rel. Lefkowitz v. Bel Fior Hotel*,<sup>92</sup> a hotel agreed to rent space to students at a community college and asked each student to contribute \$50 to a security deposit fund.<sup>93</sup> Even though the contract indicated that the hotel would attempt to allocate any damages to the student responsible for the damage, the hotel actually used the joint fund for general building repairs.<sup>94</sup> The lower court noted that the security deposit provision “require[d] the students to be collectively liable for those damages caused by a student who happens to not be financially responsible” and to “compensate

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public, both because of attorney-client privilege and evidentiary rules making settlement negotiations inadmissible for certain purposes. *See, e.g.*, FED. R. EVID. 408.

89. Both Posner and Fleming have (partially overlapping) lists. *See* Posner, *supra* note 30, at 305; Fleming, *supra* note 7, at 1432 n.322. For purposes of this Article, I analyzed thirteen unconscionability opinions published between 1964 and 1971: *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965); *Kugler v. Romain*, 279 A.2d 640 (N.J. 1971); *American Home Improvement, Inc. v. MacIver*, 201 A.2d 886 (N.H. 1964); *Murphy v. McNamara*, 416 A.2d 170 (Conn. Super. Ct. 1979); *State ex rel. Lefkowitz v. Bel Fior Hotel*, 408 N.Y.S.2d 696 (Sup. Ct. 1978), *rev'd sub nom.*, *State v. Bel Fior Hotel*, 425 N.Y.S.2d 659 (App. Div. 1980); *Albert Merrill School v. Godoy*, 357 N.Y.S.2d 378 (Civ. Ct. 1974); *Seabrook v. Commuter Housing Co.*, 338 N.Y.S.2d 67 (Civ. Ct. 1972); *Education Beneficial, Inc. v. Reynolds*, 324 N.Y.S.2d 813 (Civ. Ct. 1971); *Toker v. Westerman*, 274 A.2d 78 (N.J. Union County Ct. 1970); *Jones v. Star Credit Corp.*, 298 N.Y.S.2d 264 (Sup. Ct. 1969); *Toker v. Perl*, 247 A.2d 701 (N.J. Super. Ct. Law Div. 1968); *Frostifresh Corp. v. Reynoso*, 274 N.Y.S.2d 757 (Dist. Ct. 1966), *rev'd*, 281 N.Y.S.2d 964 (App. Div. 1967); and *State ex rel. Lefkowitz v. ITM, Inc.*, 275 N.Y.S.2d 303 (Sup. Ct. 1966).

90. Posner, *supra* note 30, at 304–05.

91. *See* Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067 (2006).

92. 408 N.Y.S.2d 696 (Sup. Ct. 1978), *rev'd sub nom.*, *State v. Bel Fior Hotel*, 425 N.Y.S.2d 659 (App. Div. 1980).

93. *Id.* at 697.

94. *Id.* at 698–99.

the hotel for the wrongful acts of the ‘judgment proof’ student.”<sup>95</sup> Of course, *Bel Fior Hotel* dealt with signatories to the contract, rather than true third parties, and the judgment was reversed on appeal; the appellate court determined that the facts did not clearly show unconscionability and the matter could not have been decided on a motion for summary judgment.<sup>96</sup>

Second, in *State ex rel. Lefkowitz v. ITM, Inc.*,<sup>97</sup> the debtors were drawn into a pyramid scheme and contracted to sell appliances to their community.<sup>98</sup> The court held the contract unenforceable, in part because the debt could only be repaid through “impos[ing]” the same terms on “a friend, relative or neighbor,” creating a cycle of resentment that would eventually run out of victims.<sup>99</sup>

Even beyond these two cases, unconscionability doctrine resonates with the theory of the redeemer: the draconian terms panned by these opinions seem calculated to compel third-party payment. Indeed, an analysis of the social setting of the unconscionability cases might reveal more than the opinions do. Fleming’s historical analysis of the setting of *Williams v. Walker-Thomas Furniture Co.* reveals that the furniture company would call borrowers’ relatives and friends in an attempt to collect the debt.<sup>100</sup>

The Uniform Commercial Code (UCC) and the Restatement (Second) of Contracts both provide that a court may refuse to enforce a contract, or a clause therein, as “unconscionable.”<sup>101</sup> Neither text, however, undertakes to explain in great detail what “unconscionable” means. That said, under the UCC, the court must allow the parties an opportunity to show why a challenged clause is problematic by presenting evidence “as to its commercial setting, purpose and effect.”<sup>102</sup> That provision, although not suggestive of third-party effects, is consistent with a theory that highlights the ways that two-party disputes spill over into a community.

The proposed Restatement of Consumer Contracts explores the issue further.<sup>103</sup> It provides that a contractual term in a consumer contract is unenforceable when it would “unreasonably expand the consumer’s liability,

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95. *Id.*

96. *State v. Bel Fior Hotel*, 425 N.Y.S.2d 659, 693 (App. Div. 1980).

97. 275 N.Y.S.2d 303 (Sup. Ct. 1966).

98. *Id.* at 315–16.

99. *Id.* at 315–16, 329.

100. See Fleming, *supra* note 7, at 1434 (“If a customer failed to pay, the store would send threatening letters, make early morning and late evening collection calls, contact the borrower’s relatives and friends, and—if necessary—repossess the merchandise.”).

101. U.C.C. § 2-302(1) (AM. L. INST. & UNIF. L. COMM’N. 1951); RESTATEMENT (SECOND) OF CONTS. § 178 (AM. L. INST. 1981).

102. U.C.C. § 2-302(2).

103. The Reporters for the Restatement of Consumer Contracts are Professors Oren Bar-Gill, Omri Ben-Shahar, and Florencia Marotta-Wurgler. For a description of their quantitative approach to restating this area of the law, see Oren Bar-Gill, Omri Ben-Shahar & Florencia Marotta-Wurgler, *Searching for the Common Law: The Quantitative Approach of the Restatement of Consumer Contracts*, 84 U. CHI. L. REV. 7 (2017). For an argument that the law of contracts is changing so rapidly that an effective restatement is impossible, see Mark E. Budnitz, *The Restatement of the Law of Consumer Contracts: The American Law Institute’s Impossible Dream*, 32 LOY. CONSUMER L. REV. 369 (2020).

the business's remedies, or the business's enforcement powers that would otherwise be applicable in the event of breach of contract by the consumer."<sup>104</sup> The Reporters' commentary provides examples of "cross-collateral clauses, waiver-of-defense clauses, and debt-collection clauses"<sup>105</sup>—some of the same harsh provisions that form the bulk of the common-law unconscionability doctrine.

Harsh creditor remedies, as defined above,<sup>106</sup> fit neatly into the proposed Restatement's prohibition on unreasonable expansions of remedies and enforcement power.<sup>107</sup> After all, remedies that operate as improper threats to third parties do "unreasonably expand" the creditor's "enforcement powers" by dragging in third parties who are not legally obligated to pay.

### B. Exemption Statutes

The second place we might look for the legal incorporation of redeemers are exemption statutes. By way of background, both state law and federal law exempt certain property from execution in satisfaction of a debt.<sup>108</sup> The Bankruptcy Code<sup>109</sup> also allows the bankruptcy trustee to strip off judicial liens from otherwise exempt property and certain kinds of exploitative liens on household goods.<sup>110</sup>

How do laws protecting a debtor's property relate to redeemers? State and federal exemption statutes protect property belonging to the debtor in which the debtor's family, household, or dependents have a strong interest. Such property includes the homestead, a motor vehicle, and various property used by or for the debtor's family and dependents, such as household furnishings, household goods, jewelry, tools of trade, and health aids.<sup>111</sup>

The Bankruptcy Code's lawmakers expressly indicated their intent to draw the circle of protection more widely than around just the individual debtor.<sup>112</sup> Indeed, the exemption statute in § 522(d) of the Bankruptcy Code mentions the word "family" twice, the word "household" four times, and the word "dependent" seventeen times.<sup>113</sup> Many state exemption statutes are similarly

104. RESTATEMENT OF CONSUMER CONTS. § 5(c)(2) (AM. L. INST. 2022) (forthcoming).

105. *Id.* § 5 cmt.

106. *See supra* Part I.A.

107. RESTATEMENT OF CONSUMER CONTS. § 5(c)(2) cmt.

108. Exemption statutes apply both under nonbankruptcy law and in bankruptcy court. *See* 11 U.S.C. § 522.

109. 11 U.S.C. §§ 101–1532.

110. *See id.* § 522(f). Under this section, the trustee in bankruptcy may avoid nonpossessory, nonpurchase-money security interests in certain household goods, tools of trade, health aids, and similar items belonging to the debtor. *Id.*

111. *See, e.g., id.* § 522(d)(1)–(4), (6), (9).

112. Professor Vern Countryman argued in 1960 that exemption laws should allow each debtor a "prescribed cash allowance" and let the individual decide which assets to exempt. Vern Countryman, *For a New Exemption Policy in Bankruptcy*, 14 RUTGERS L. REV. 678, 746 (1960). According to Countryman, the focus on property categories derives from the machinations of state post-judgment collections law, which deals with "property of the debtor as the levying creditor may find it." *Id.* at 681.

113. *See* 11 U.S.C. § 522(d). Even though only adults file for bankruptcy, millions of dependents are swept into the bankruptcy courts each year through their parents' filings. *See*

broad,<sup>114</sup> and when the National Conference of Commissioners on Uniform State Laws proposed a “Uniform Exemption Act,” it observed that several exemptions “recognize use or need by a dependent of the individual debtor as a factor in the determination of the availability of the exemption.”<sup>115</sup>

Exemption statutes obviously protect the individual.<sup>116</sup> But they protect the debtor’s family as well, even though they do not expressly expect the family to repay the debt.<sup>117</sup> This purpose of exemption laws has long been recognized. In 1950, Professor George L. Haskins noted that “[t]he principal objective of the homestead laws is generally regarded as the security of the family, which in turn benefits the community to the extent that such security prevents pauperism and provides the members of the family with some measure of stability and independence.”<sup>118</sup> As Fleming uncovered, lawmakers “invoked the same reasoning” when discussing the scope and intent of exemption laws beyond the homestead.<sup>119</sup>

### C. Consumer Protection Law

The third place we might look for legal acknowledgement of the role of redeemers is consumer protection law. Although many consumer protection provisions are expressly couched in values like the dignity and privacy of debtors,<sup>120</sup> others fit neatly within the theory of the redeemer.

Elizabeth Warren, *Bankrupt Children*, 86 MINN. L. REV. 1003, 1014 (2002) (arguing that “children are the great uncounted constituency of bankruptcy”); Katherine Porter, *The Damage of Debt*, 69 WASH. & LEE L. REV. 979, 991 (2012) (pointing out the damage wreaked on dependents by overindebtedness).

114. For example, the statute for the Commonwealth of Massachusetts exempts, among other things, “necessary wearing apparel, beds and bedding for the debtor *and the debtor’s family*,” “household furniture necessary for the debtor *and the debtor’s family*,” and “[p]rovisions necessary and procured and intended for the use *of the debtor’s family*.” MASS. GEN. LAWS ch. 235, § 34 (2023) (emphases added).

115. UNIF. EXEMPTIONS ACT, Prefatory Note 5 (NAT’L CONF. OF COMM. ON UNIF. STATE L. 1976).

116. Professor Thomas H. Jackson noted in 1985 that property-based exemptions help advance the “fresh start” policy of bankruptcy law by providing a “relatively short list of assets considered vital to the typical individual’s well-being.” Thomas H. Jackson, *The Fresh-Start Policy in Bankruptcy Law*, 98 HARV. L. REV. 1393, 1435 (1985). The National Conference of Commissioners on Uniform State Laws endorsed this view, stating a decade earlier that protected property should “have a perceived relation to the provision of shelter, clothing, and other necessities of daily living in this country.” UNIF. EXEMPTIONS ACT, Prefatory Note 4.

117. See Anne Fleming, *The Public Interest in the Private Law of the Poor*, 1 HARV. L. & POL’Y REV. 159, 175 (2019).

118. George L. Haskins, *Homestead Exemptions*, 63 HARV. L. REV. 1289, 1289 (1950); see also Frank R. Kennedy, *Limitation of Exemptions in Bankruptcy*, 45 IOWA L. REV. 445, 447 n.11 (1960) (noting that exemptions protect the “financial security of the family unit”). Indeed, this point is underscored by the fact that debtors cannot protect exempt property from domestic support obligations, see 11 U.S.C. §§ 522(c)(1), 523(a)(5), since “the family is the very group exemptions are designed to protect.” *Bankruptcy Exemptions: Critique and Suggestions*, 68 YALE L.J. 1459, 1470 (1959).

119. Fleming, *supra* note 117, at 176.

120. See, e.g., 15 U.S.C. § 1692(a) (“Abusive debt collection practices contribute to the number of personal bankruptcies, to marital instability, to the loss of jobs, and to invasions of individual privacy.”).

For example, the Fair Debt Collection Practices Act<sup>121</sup> (FDCPA) provides that debt collectors may not (with some exceptions) communicate with the debtor's family, friends, or community members in an attempt to collect the debt.<sup>122</sup> Nor may debt collectors publish a dunning list or advertise the sale of the debt to induce payment.<sup>123</sup> One exception allows debt collectors to call third parties in an attempt to locate the debtor;<sup>124</sup> however, collectors may not state that they are attempting to collect a debt,<sup>125</sup> and any mailed materials must keep that information out of the view of third parties.<sup>126</sup> Similarly, the FDCPA directly regulates threats made by debt collectors, providing that they may not threaten imprisonment for debt unless such imprisonment would be lawful and the debt collector intends to pursue it as a remedy.<sup>127</sup>

Although these rules may have been implemented to protect the debtor's dignity and privacy, they are also consistent with the theory that third-party redeemers are within the scope of the act's legal protection.<sup>128</sup>

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121. 15 U.S.C. §§ 1692–1692p.

122. *Id.* § 1692c(b). The FDCPA regulates debt collectors only, not the owners or purchasers of debt. *See id.* § 1692a(6) (defining “debt collector”); *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1724 (2017) (holding that entities who regularly purchase debts and then seek to collect on those accounts are not “debt collectors” subject to the FDCPA). Yet state statutes cover similar ground and in most cases are not limited to debt collectors. For example, the Florida Consumer Collection Practices Act, FLA. STAT. § 559.72(5) (2023), prohibits anyone attempting to collect a consumer debt from “[d]isclos[ing] to a person other than the debtor or her or his family information affecting the debtor’s reputation . . . with knowledge or reason to know that the other person does not have a legitimate business need for the information or that the information is false.” *Id.*; *see also id.* § 559.72(4), (13), (14), (16).

123. 15 U.S.C. § 1692d(3)–(4).

124. *Id.* § 1692b(1).

125. *Id.* § 1692b(2).

126. Specifically, the debt collector may not communicate by postcard or put anything on the outside of the envelope that indicates that the communication relates to debt collection. *See id.* § 1692b(4)–(5); *see also id.* § 1692f(8) (prohibiting the use of “any language or symbol, other than the debt collector’s address, on any envelope when communicating with a consumer by use of the mails or by telegram, except that a debt collector may use his business name if such name does not indicate that he is in the debt collection business”).

127. *Id.* § 1692e(4). For the same reason, a debt collector may not solicit a postdated check for the purpose of depositing it, watching the account bounce, and then “threatening or instituting criminal prosecution.” *Id.* § 1692f(3).

128. Indeed, as Professor Neil Sobol has pointed out, as the FDCPA was being passed, a former debt collector testified to Congress that he would “call[] parents of alleged debtors and [tell] them that their children would be incarcerated unless the parents paid their debt.” Neil L. Sobol, *Fighting Fines & Fees: Borrowing from Consumer Law to Combat Criminal Justice Debt Abuses*, 88 U. COLO. L. REV. 841, 886–87 (2017); *see also* Christopher K. Odinet & Roederick C. White, Sr., *Regulating Debt Collection*, 36 REV. BANKING & FIN. L. 869, 899–900 (2017) (describing attempts to regulate collection calls to third parties); 12 C.F.R. § 1006.14(a) (2023) (“A debt collector must not engage in any conduct the natural consequence of which is to harass, oppress, or abuse *any person* in connection with the collection of a debt . . .” (emphasis added)). The Consumer Financial Protection Bureau has rulemaking authority to regulate “unfair, deceptive, or abusive acts or practices” under the FDCPA. *See* 12 U.S.C. § 5531.

#### D. *Standing Outside the Scope of the Law*

As shown above, redeemers are an elusive presence in American law. To be sure, their role is consistent with longstanding bodies of law, like unconscionability doctrine, exemption statutes, and consumer protection. But much of the content of the restrictions on harsh creditor remedies outlined above could also be explained by resorting to individualistic values like privacy or autonomy; the laws rarely, if ever, make express mention of the widespread phenomenon of third-party payments for debt.

Yet this is not the only area in which the famously individualistic American legal system struggles to incorporate societal phenomena based on tight-knit relationships between numerous individuals in a community. Far from it. The U.S. justice system is an adversarial one, and its scope is tightly set to focus attention on the “main characters.” Although this presents a challenge for minimizing the spillover effects of third-party payment, we have numerous avenues for doing so.

### III. THIRD-PARTY REDEEMERS IN DEBT COLLECTION LAW

We may share the moral instinct that harsh creditor remedies are problematic. But how can we draw a principled line between debt collection tactics that should be unlawful and those that are merely uncomfortable? And how can we articulate when the law should condone or prohibit debt collection tactics? Legal scholars have provided numerous theories for why courts and legislatures should (and do) refuse to enforce harsh contractual provisions agreed to by the parties. This section lays out the standard theories and adds an additional one: the theory of the redeemer.

#### A. *Parties, Privacy, and Parentalism*

The traditional narrative is that harsh creditor remedies induce the debtor to repay debt out of exempt assets.<sup>129</sup> In this way, such remedies undercut the policies inherent in exemption laws and violate the debtor’s dignity and rehabilitation prospects.

Scholars associated with the economic analysis of law, by contrast, argue that the state should generally enforce all bargained-for and voluntarily agreed-to contractual terms.<sup>130</sup> When legal rules create unfair distributive outcomes, redistribution of wealth should take place through the tax

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129. See, e.g., Richard R.W. Brooks, *Credit Past Due*, 106 COLUM. L. REV. 994, 1004–05 (2006) (repossession of household goods); *id.* at 1008 (threat of a payday loan customer’s check clearing); Bradley J.B. Toben & Elizabeth A. Toben, *Using Turnover Relief to Reach the Nonexempt Paycheck*, 40 BAYLOR L. REV. 195, 197 (1988); Shepard, *supra* note 44, at 1538.

130. For good examples of a law-and-economics approach applied to debt collection specifically, see generally Todd J. Zywicki, *The Law and Economics of Consumer Debt Collection and Its Regulation*, 28 LOY. CONSUMER L. REV. 167, 183–87 (2016); Richard A. Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975). To be sure, a thorough economic analysis would account for the political action costs of operating through the income tax system. See, e.g., Lee Anne Fennell & Richard H. McAdams, *The Distributive Deficit in Law and Economics*, 100 MINN. L. REV. 1051, 1053 (2016).

system.<sup>131</sup> Several scholars, like Professors Thomas H. Jackson, Eric Posner, and Anne Fleming, have developed an important adjustment to the default rule: when the state has a commitment to a minimum standard of welfare, draconian contractual terms undermine that commitment, giving the state a nonparentalistic reason not to enforce such terms.<sup>132</sup> Put differently, because the state is committed to a minimum standard of welfare, it can regulate private agreements that increase the risk of its citizens falling onto the welfare rolls. In so doing, the state is not acting parentalistically—that is, acting as if it appreciates the true preferences of its citizens better than they do themselves—but instead implementing its own preferences.

Shiffrin takes a different, deontological approach, pointing out that contract enforcement is not a given, but rather an act of the community lending its aid to enforcing an agreement.<sup>133</sup> Accordingly, when the community has a moral norm against enforcing harsh or cruel terms, it can choose not to do so, and that decision will have been made for nonparentalistic reasons.<sup>134</sup> As Professor G.R. Rubin put it in a study of imprisonment for debt in England, “what interest could the State claim in enforcing payment of debts by those who did not owe the money, as most commonly happened when relatives and friends dug into their own pockets to save the debtor from imprisonment?”<sup>135</sup>

Lastly, harsh creditor remedies conflate criminal and civil law.<sup>136</sup> Allowing such remedies thus undercuts the “channelling” function of law, which emphasizes that in addition to setting incentives and implementing duties, law promotes “stable ways of being in the world.”<sup>137</sup>

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131. See generally Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994).

132. See Jackson, *supra* note 116, at 1402 (“The existence of social welfare programs leads individuals to undervalue the costs of engaging in risky activities today because they can depend on society to bear a portion of the costs that may arise tomorrow . . . . Accordingly, we may view such programs as a form of social insurance, paid for in the form of general taxes.”); see also Fleming, *supra* note 117, at 175; Ronald J. Mann & Jim Hawkins, *Just Until Payday*, 54 UCLA L. REV. 855, 884 (2007); Posner, *supra* note 30, at 297; Amy J. Schmitz, *Females on the Fringe: Considering Gender in Payday Lending Policy*, 89 CHI.-KENT L. REV. 65, 101–02 (2014); Shepard, *supra* note 44, at 1538.

133. See Shiffrin, *supra* note 34, at 221–22.

134. *Id.* at 221–30. In a similar deontological vein, Professor David A. Skeel, Jr. has argued that bankruptcy for governmental entities may make sense when the process could preserve the dignity of the debtor entity. See David A. Skeel, Jr., *When Should Bankruptcy Be an Option (for People, Places, or Things)?*, 55 WM. & MARY L. REV. 2217 (2014).

135. G.R. Rubin, *Law, Poverty and Imprisonment for Debt, 1869–1914*, in LAW, ECONOMY & SOCIETY, 1750–1914: ESSAYS IN THE HISTORY OF ENGLISH LAW 241, 252 (G.R. Rubin & David Sugarman eds., 1984). Rubin’s thorough historical analysis shows that imprisonment for debt lingered on in English law, under various doctrinal labels, long past the date at which debtors’ prisons were supposed to have been abolished.

136. See Shepard, *supra* note 44, at 1540.

137. Christopher D. Hampson, *Bankruptcy & the Benefit Corporation*, 96 AM. BANKR. L.J. 93, 124 (2022). This mode of analysis traces back at least to Professor Carl E. Schneider. In 1992, Schneider laid out five functions of family law and theorized “the channelling function of law,” a function that he described as “less self-evident.” See Carl E. Schneider, *The Channelling Function in Family Law*, 20 HOFSTRA L. REV. 495, 497–98 (1992); see also CARL E. SCHNEIDER & MARGARET F. BRINING, AN INVITATION TO FAMILY LAW 198–202 (2d ed.



### B. *The Third-Party Redeemer*

These standard accounts miss a fundamental point.<sup>138</sup> They all portray the relevant cast of legal actors as the debtor, the creditor, and the state. But there is another cast member who deserves a speaking role. The debtor exists within a community of people who might feel compelled to pay the debt because their standalone legal or moral commitments require them to “step into the breach.”<sup>139</sup> I call this person a *redeemer*, though the provenance of the word goes back centuries. And even though contract law has long focused on the parties to the contract, scholars have begun to examine instances of “nonparty interests” in contract law and broaden the doctrine’s theoretical foundations accordingly.<sup>140</sup>

The concept of redemption<sup>141</sup> should be familiar to American lawyers. The ancient concepts of “mortgage” and “foreclosure” both refer implicitly to a right of redemption. The owner of the property subject to be sold for the

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2000). As I have previously noted, *see* Hampson, *supra*, at 124 n.161, Schneider’s theory fits nicely with legal philosopher Professor Joseph Raz’s second function of law, “providing facilities for private arrangements between individuals.” JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* 169–72 (1979).

138. Some scholars have picked up on pieces of this insight. But even when they do, they describe the turn to third-party payors as an act of borrowing, not as the coercive phenomenon that it is. *See, e.g.*, Shepard, *supra* note 44, at 1541 (“To the extent that in personam proceedings place pressure on debtors to borrow money from friends or family or from fringe lending sources (often at exorbitant interest rates), debtors may dig themselves deeper into a financial morass.”); William C. Whitford, *A Critique of the Consumer Credit Collection System*, 1979 WIS. L. REV. 1047, 1085 (“[S]ome debtors who presently pay ‘voluntarily’ by foregoing other desires or needs, or by borrowing from a friend or relative, would probably regard themselves as ‘can’t pay’ in the absence of credible threats of coercive execution.”); *id.* at 1057 n.37 (“Some of these sources include borrowing from a close friend or relative, surrendering or borrowing on a life insurance policy, or arranging a consolidation loan.”).

139. BRUCE H. MANN, *REPUBLIC OF DEBTORS: BANKRUPTCY IN THE AGE OF AMERICAN INDEPENDENCE* 79 (2002) (describing how creditors “hoped that the rigors of imprisonment would induce debtors to disclose concealed wealth or to part with assets that were exempt from attachment or, perhaps, that family members might step into the breach”); *see also* Sobol, *supra* note 49, at 77–78. Professor Michael M. Greenfield addressed the reputational and privacy interests of the debtor’s family, friends, and neighbors, though without recognizing the economic stakes they may have as redeemers. *See* Michael M. Greenfield, *Coercive Collection Tactics—an Analysis of the Interests and the Remedies*, 1972 WASH. U. L.Q. 1, 13–14.

140. *See generally* Omri Ben-Shahar, David A. Hoffman & Cathy Hwang, *Nonparty Interests in Contract Law*, 171 U. PA. L. REV. 1095 (2023); Seana Valentine Shiffrin, *Hidden Delegations: The Assignment of Contractual Rights and Consumer Debt*, 86 MODERN L. REV. 1 (2023). For a similar broadening of our understanding of tort law, *see generally* Steven Schaus, *Wrongs to Us*, 121 MICH. L. REV. 1185 (2023) (theorizing how consortium claims are best understood as a violation of joint claims).

141. My use of the word “redemption” in the context of creditor-debtor law has a completely different meaning (and set of connotations) from its use by white Democrats in the post–Civil War American South to overthrow the Radical Republicans and bring the First Reconstruction to an end. For an excellent treatment of this sordid era in the history of the United States, including the promise of the Fusion Movement in North Carolina, *see generally* Daniel Farbman, *Redemption Localism*, 100 N.C. L. REV. 1527 (2022). For an incisive analysis of the period leading up to the attempted coup on January 6, 2021, as a “Second Redemption” period, *see* Anthony Michael Kreis, *The New Redeemers*, 55 GA. L. REV. 1483, 1488–1500 (2021).

payment of debts would have a prescribed period during which to rustle up the funds to pay back their creditor in full. When that deadline<sup>142</sup> had passed, the creditor could foreclose the right of redemption.<sup>143</sup>

But although redemption is familiar, we may have forgotten who “redeemers” really are. Redemption is less about the debtor suddenly finding funds to repay debt and more about *someone else* coming to the debtor’s rescue. The concept of a “redeemer” is an old one, tracing back at least to ancient Mesopotamia and the Hebrew Bible, which provided an opportunity for a close relative to “buy back” property at risk of being sold to creditors.<sup>144</sup>

But how should we define a “redeemer” in contemporary American law, in which kinship is not always the best frame of reference? To my mind, a redeemer can be anyone on whom the debtor or the debtor’s dependents would become dependent in the event of the debtor’s incapacitation. For any of the remedies discussed here, the person who is next in line to care for the debtor or the debtor’s dependents has economic, legal, and moral reasons to step in. Redeemers are family, but not necessarily kin—they are family in the functional way in which Professors Martha Minow, Sara C. Bronin, and others use the term.<sup>145</sup>

Even for adults, the most common type of redeemer seems to be a parent, since parents are often more stable than their adult children and have good reason to prevent their children from incapacitation, especially if they have grandchildren whose care they would take over. President James Madison, known as the “Father of the Constitution,” was in fact a redeemer—he bailed his stepson out of a Philadelphia debtors’ prison in 1830.<sup>146</sup> The redeemer

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142. Note that “mort” is Latin for dead. See *Mort*, LATIN DICTIONARY, <http://www.latin-dictionary.net/search/latin/mort> [<https://perma.cc/2WSB-HP5L>] (last visited Nov. 3, 2023).

143. The Bankruptcy Code, too, contains a right of redemption for tangible personal property. See 11 U.S.C. § 722 (providing that an “individual debtor may . . . redeem tangible personal property intended primarily for personal, family, or household use” from a lien securing otherwise dischargeable debt, when the property is exempt or abandoned, by paying the value of the collateral). See also David Sheinfeld, *Bankruptcy & the Underwater Home: A Case for Real Property Redemption*, 10 MICH. BUS. & ENTREPRENEURIAL L. REV. 85, 94–95, 94 n.42 (2020) (tracing the origins of the doctrine to the English courts of equity and advocating that U.S. bankruptcy law extend to the redemption of real property).

144. See, e.g., *Leviticus 25:25–29* (NASB) (“If a fellow countryman of yours becomes so poor that he sells part of his property, then his closest redeemer is to come and buy back what his relative has sold. Or in case someone has no redeemer, but recovers to find sufficient means for its redemption, then he shall calculate the years since its sale and refund the balance to the man to whom he has sold it, and so return to his property. But if he has not found sufficient means to get it back for himself, then what he has sold shall remain in the hands of its purchaser until the year of jubilee; but at the jubilee it shall revert, so that he may return to his property. Likewise, if a man sells a dwelling house in a walled city, then his redemption right remains valid until a full year after its sale; his right of redemption lasts a full year.”); Robert C. Ellickson & Charles DiA Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 CHI.-KENT L. REV. 321, 400 (1995).

145. See Martha Minow, *Redefining Families: Who’s In and Who’s Out?*, 62 U. COLO. L. REV. 269, 270 (1991); Sara C. Bronin, *Zoning for Families*, 95 IND. L.J. 1, 4–5 (2020).

146. See *James Madison and His Stepson, John Payne Todd*, Editorial Note, NAT’L ARCHIVES: FOUNDERS ONLINE, <https://founders.archives.gov/documents/Madison/04-03-02-0659> [<https://perma.cc/PY8F-NUCJ>] (last visited Nov. 3, 2023). Indeed, some redeemers overextend themselves financially in their efforts to help family members. See John A.E.

could also be a spouse, a grandparent, a godparent, a sibling, or even a child. Adult children of undocumented debtors may be more stable than their parents. Similarly, a redeemer could be a religious organization that stands in for the family.<sup>147</sup>

The notion of the redeemer disrupts some of the foundational concepts of civil law. We are used to thinking of defendants (or debtors) as potentially judgment-proof or collection-proof. Either debtors are able to pay, or they are not. But that picture is too simplistic. “[A]bility to pay’ is not endogenous to the sanctions wielded against the debtor: here, as there, the threat of imprisonment increases the risk that the debtor will turn to family, friends, or church—people and institutions not legally obligated to pay—to or illegal sources of money.”<sup>148</sup> Indeed, as Professor Stephen J. Ware uncovered, when the English Parliament debated debtors’ prisons in the early twentieth century, they focused on “whether debtors’ families and friends should be confronted with the choice of paying their relative’s or friend’s debts or seeing that relative or friend imprisoned.”<sup>149</sup>

A reasonable opportunity for redemption can be a good thing, of course.<sup>150</sup> When creditors have the right to seize property that has value to a family or

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Pottow, *The Rise in Elder Bankruptcy Filings and the Failure of U.S. Bankruptcy Law*, 19 ELDER L.J. 119, 140–41 (2011); see also Deborah Thorne, Pamela Foohey, Robert M. Lawless & Katherine Porter, *Graying of U.S. Bankruptcy: Fallout from Life in a Risk Society*, 90 SOCIOLOGICAL INQUIRY 681 (2020) (describing the demographics of elder bankruptcy filers).

147. Such an organization need not be theistic; the descriptor “religious” could refer to any tight-knit, quasi-familial community. The Latinate root of the word “religion” is related to the English words “lien” and “ligament,” and all share the common theme of *binding*. See *Religion*, CHRISTIAN STANDARD (June 22, 2020), <https://christianstandard.com/2020/06/religion/> [<https://perma.cc/4LDU-46FA>].

148. Hampson, *supra* note 5, at 28. Similarly, “[m]ore unsavory forms of collection actions, like debtors’ prisons, might induce a debtor ‘voluntarily’ to make payment out of property that creditors cannot attach directly, or income they cannot garnish.” *Id.* at 7 n.28; see also *id.* at 11 (“Even instances where defendants manage to scrounge up the money are morally and legally troubling, as the threat of imprisonment causes debtors to hand over money from disability and welfare checks, or induces family members and friends, who aren’t legally responsible for the debt, to scrape together the money.”); *id.* at 16. The Supreme Court made much the same point in *Bearden v. Georgia*. See 461 U.S. 660, 670–71 (1982) (“Revoking the probation of someone who through no fault of his own is unable to make restitution will not make restitution suddenly forthcoming. Indeed, such a policy may have the perverse effect of inducing the probationer to use illegal means to acquire funds to pay in order to avoid revocation.”); see also Matthew J. Baker, Metin Cosgel & Thomas J. Miceli, *Debtors’ Prisons in America: An Economic Analysis*, 84 J. ECON. BEHAV. & ORG. 216, 221–22 (2012) (arguing that debtors’ prison is largely a response to the high costs of determining a debtor’s true ability to pay); Whitford, *supra* note 138, at 1061, n.51 (“It is not costless to a creditor to determine whether a debtor is a ‘won’t pay’ or a ‘can’t pay,’ and as a consequence creditors will sometimes fruitlessly harass or sue a ‘can’t pay’ because it is cheaper than determining the debtor’s true status.”).

149. Stephen J. Ware, *A 20th Century Debate About Imprisonment for Debt*, 54 AM. J. LEGAL HIST. 351, 372–73 (2014).

150. Redemption can also be an opportunity for exploitation. I thank John Rao for alerting me to scammers whose business model centers around providing a redemption opportunity. Similarly, as Professor Angela Littwin theorized and uncovered through a series of fifty-five interviews, “coerced debt” is a prevalent form of domestic violence. See Angela Littwin, *Coerced Debt: The Role of Consumer Credit in Domestic Violence*, 100 CALIF. L. REV. 951

to a community, providing an opportunity for the wider community to gather funds and pay off the debt is an important chance that should not be denied. By contrast, the strict foreclosure laws discussed above give debtors no opportunity for redemption.<sup>151</sup> By doing so, they deprive the debtor of the chance to reclaim the property by seeking help, and they deprive redeemers of the chance to buy back property that may have been in the family for generations.<sup>152</sup>

When creditors have access to harsh creditor remedies, they can distort the proper role of the redeemer. Harsh creditor remedies are likely (indeed, sometimes intended) to draw in a nonparty to repay a debt that they have not agreed to guarantee or insure. Despite having no legal obligation to act,<sup>153</sup> this person feels compelled to intervene.

In this way, harsh creditor remedies create a sort of “shadow insurance” to repay the contract. This shadow insurance is meaningfully different from the normative commitments of the state, since the funds go toward paying creditors.<sup>154</sup> Redemption thus highlights a distinct concern from whether harsh creditor remedies might force debtors onto the welfare rolls—whether creditors can use harsh creditor remedies to “reach through” or “pierce” the debtor and access funds belonging to family, friends, neighbors, or community members.

In doing so, harsh creditor remedies violate the rights of redeemers, who are nonparties to the contract. This kind of externality can justify bans on harsh creditor remedies without resort to parentalistic laws.

### C. Defining Harsh Creditor Remedies

How can we determine what kinds of creditor remedies are too harsh to allow? To start, if a redeemer is someone on whom the debtor or debtors’ dependents would become dependent because of the harsh creditor remedy, then remedies with the effect of incapacitating the debtor qualify *per se*. Imprisonment, homelessness, destitution, and deportation all have the likely effect of compelling third-party redeemers to repay debt.

If we wanted to develop a test that looked instead to the harshness of the sanction, the analysis would become a little more muddled. Unlike with the welfare-state concern, we cannot simply look to the minimal standard of

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(2012). Coerced debt distorts the relationships we would typically associate with redemption and turns it into a form of exploitation and structural abuse.

151. *See supra* notes 69–71 and accompanying text.

152. Indeed, perhaps for this reason, the Bankruptcy Code defines the “foreclosure of a debtor’s equity of redemption” to be a transfer and thus subject to avoidance. *See* 11 U.S.C. § 101(54).

153. To be sure, there is no legal or contractual duty to act, but that does not mean that we should disregard the moral commitments that induce a redeemer to intervene. *See generally* JONATHAN HAIDT, *THE RIGHTEOUS MIND: WHY GOOD PEOPLE ARE DIVIDED BY POLITICS AND RELIGION* (2012) (defining morality as encompassing care, fairness, liberty, loyalty, authority, and sanctity). Many communities in American society believe they have a duty to assist the poor and oppressed, whether for religious or philosophical reasons.

154. *See, e.g.,* Fleming, *supra* note 117, at 164–65 (contrasting the “public fisc” from “other people and institutions”).

living implied by poverty lines and welfare programs. The literature is full of synonyms that might mean something to a judge or legislator—such as “shock the conscience,” “oppressive,” “unreasonably harsh,” or “fundamentally unfair”<sup>155</sup>—but the content of those terms must be supplied by the reader; they do not in themselves carry any content.<sup>156</sup>

A subjective test could work in certain circumstances. A subjective test would mean banning harsh creditor remedies when we can show that those remedies have actually compelled specific third parties to offer redemption payments. This approach has some benefits: it would surgically prevent the most concerning cases. In discrete cases, however, it suffers from procedural and evidentiary problems, most obviously the fact that these third parties—whose involvement we are trying to cabin—would have to testify or at least submit a declaration.

Additionally, some third parties might be too quick to repay or to shield a debtor from any adverse consequences. Imagine a third party who contributes funds to help a debtor escape an involuntary bankruptcy or to avoid a bad mark on a credit score. Surely that cannot mean that we must abolish involuntary bankruptcies and credit scores. A subjective test might be overinclusive for that reason.

An objective test would work better. Under an objective test, lawmakers and judges would ask whether a particular remedy is sufficiently harsh that a reasonable third party in the debtor’s community would feel compelled to pay on the debtor’s behalf. Or, put differently, the test would be whether the remedy is sufficiently harsh that it has the likely effect of compelling third parties in the debtor’s community to repay on the debtor’s behalf. This test has the procedural and evidentiary advantage of not requiring insight into specific parties’ circumstances, but instead puts the burden on lawmakers and judges to determine the objective standard against which to measure harsh creditor remedies. Of course, as with unconscionability, lines are difficult to draw and the question of who draws them is similarly challenging.<sup>157</sup>

That said, some cases should not provoke moral or legal vacillation. The four remedies described above—imprisonment, homelessness, destitution, and deportation—all seem to fit this definition handily. Conversely, other creditor remedies, like orderly and peaceful repossession of collateral or involuntary bankruptcy,<sup>158</sup> seem far less likely to compel third parties into action.

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155. RESTATEMENT OF CONSUMER CONTS. § 5 cmt. 3 (AM. L. INST. 2022) (forthcoming).

156. For the same reason, we cannot easily appeal to the law of threats. On its face, those principles appear to apply; if the point of threatening the remedy against the debtor is to compel or induce payment from third parties, straightforward principles from the contract law of threats come into view. But the standards for improper threats are similarly vague. *See, e.g.*, RESTATEMENT (SECOND) OF CONTS. § 175(1) (AM. L. INST. 1981) (“If a party’s manifestation of assent is induced by an improper threat by the other party that leaves the victim no reasonable alternative, the contract is voidable by the victim.”).

157. Courts may hesitate to take bold action, but as Fleming argued, sometimes a bold court decision can prompt legislative action. *See Fleming, supra note 7, at 1424.*

158. *See* 11 U.S.C. § 303.

*D. Assessing Harsh Creditor Remedies*

Remedies that compel redemption are problematic from almost every angle. To be fair, this is not a value-neutral assertion, but one that is safely described as “normatively thin and widely supported.”<sup>159</sup> From a duty-based point of view, harsh creditor remedies erode the action-inaction distinction, turning those who have not agreed to guarantee a debt into unwilling shadow insurers. From a utility-based point of view, the ex post analysis reveals that the true financial arrangement is not bilateral but multilateral, dragging the redeemer into the situation.<sup>160</sup> Harsh creditor remedies create moral hazard: if the creditor would like access to the compelled redeemer’s funds, the efficient way to do so is to bring the redeemer into the arrangement ex ante. That way, the redeemer can negotiate the terms of the debt and the scope of their willingness to backstop the debt. From a “channelling” point of view, harsh creditor remedies erode the distinction between contractual guarantees and charity. Understood in this way, we cannot attack bans on harsh creditor remedies as discouraging either charity or lending.

Like charity, redemption is a social good, as it gives people a chance to use their wealth to help a friend or family member. Thus, one might argue that banning harsh creditor remedies would remove an opportunity for charity. This argument only works if bans on harsh creditor remedies were taken to an extreme. If we simply disallow the most unconscionable practices, those that convert grace to obligation, we would leave charitable giving within its proper scope: responding to true need, rather than contrived need.

With respect to lending, as professors such as Richard Hynes, Eric Posner, and Todd Zywicki have pointed out, any regulation of credit markets can lead to term repricing or rationing, whereby access to credit is constrained or cut off completely.<sup>161</sup> That said, the extent to which banning harsh creditor remedies would raise interest rates or cut off disadvantaged populations from

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159. See Fleming, *supra* note 117, at 192. Fleming argues that “[s]aving taxpayer money is not controversial,” *id.*, comparing it to Professor Joseph William Singer’s description of utilitarianism and Professor Dan M. Kahan’s description of deterrence. See Joseph William Singer, *Normative Methods for Lawyers*, 56 UCLA L. REV. 899, 915 (2009); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413, 445–46 (1999).

160. In a series of law review articles, Oren Bar-Gill and Omri Ben-Shahar made a similar law-and-economics argument in the context of coercive threats, arguing that such threats should be enforced if they are credible. See Oren Bar-Gill & Omri Ben-Shahar, *Credible Coercion*, 83 TEX. L. REV. 717 (2005); Oren Bar-Gill & Omri Ben-Shahar, *The Law of Duress and the Economics of Credible Threats*, 33 J. LEGAL STUD. 391 (2004); see also Einer Elhauge, *Contributed Threats Versus Uncontrived Warnings: A General Solution to the Puzzles of Contractual Duress, Unconstitutional Conditions, and Blackmail*, 83 U. CHI. L. REV. 503 (2016). That said, the analysis looks quite different in a multilateral situation than in a bilateral one. When multiple parties are involved, the analysis most closely resembles the legal prohibition on gathering blackmail material, which Bar-Gill and Ben-Shahar agree can be justified, to reduce the incentives to gather such information and thus to “discourag[e] the creation of credible threats.” Bar-Gill & Ben-Shahar, *Credible Coercion*, *supra*, at 776; see also *id.* at 775 n.194.

161. See Richard Hynes & Eric A. Posner, *The Law and Economics of Consumer Finance*, 4 AM. L. & ECON. REV. 168, 184–85 (2002); Zywicki, *supra* note 130, at 188.

credit is an empirical question. And even if the effect were credit rationing, that outcome might be appropriate: as Professor Abbye Atkinson has persuasively argued, the use of credit to provide support to impoverished communities is “deeply flawed” because it merely redistributes future wealth into the present without considering whether the debtor will experience greater wealth in the future.<sup>162</sup>

And there is a simpler defense, too: lenders who are uncomfortable relying on the borrower’s personal wealth should simply seek a guarantee or an appropriate security interest, rather than lender and borrower agreeing to a bilateral agreement that is likely to drag in an ex post guarantor. The fact that third-party redeemers get dragged in to pay debts is a clear externality that too many scholars have ignored.<sup>163</sup>

#### IV. REPAIRING THE WALLS AGAINST HARSH CREDITOR REMEDIES

Harsh creditor remedies—like imprisonment, homelessness, destitution, and deportation—threaten the foundational principle of limited liability in American civil law.<sup>164</sup> But we can and should take several steps to cabin inappropriate spillover effects on redeemers, as well as maintain the ordered distinction between criminal and civil liability. This part details avenues for supervision, litigation, and education that can be employed to reinforce the all-important ground rules that many of us have taken for granted.<sup>165</sup>

As a threshold matter, much of the problem here is the use or threat of actions that are *already* unlawful and go unchecked due to legal actors in local courts either playing loose with the rules or going rogue.<sup>166</sup> Some local

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162. Abbye Atkinson, *Rethinking Credit as Social Provision*, 71 STAN. L. REV. 1093, 1098 (2019); *see also* Abbye Atkinson, *Borrowing Equality*, 120 COLUM. L. REV. 1403, 1410 (2020) (critiquing the notion that access to credit, by itself, can promote equality); Chrystin Ondersma, *Borrowing Equality: Dispossession and the Need for an Abolitionist Approach to Survival Debt*, 120 COLUM. L. REV. F. 229, 315–16 (2020) (advocating for an abolitionist approach to “survival debt”). This concern is particularly poignant when we consider the expansive evidence that debt collection methods are disproportionately wielded against communities of color. *See, e.g.*, Tonya L. Brito, Kathryn A. Sabbeth, Jessica K. Steinberg & Lauren Sudeall, *Racial Capitalism in the Civil Courts*, 122 COLUM. L. REV. 1243, 1278–81 (2022).

163. For example, I cannot find any discussion, sustained or otherwise, of third-party payors in Zywicki’s analysis of debt collection, and he gives debtors’ prisons only a passing glance. *See* Zywicki, *supra* note 130, at 173, 186 n.64. Because redeemers may be as financially vulnerable as their debtors, harsh creditor remedies have the likely effect of deepening the financial weight placed on communities that are already disparately impacted by debt collection activity. *See, e.g.*, CLAIRE JOHNSON RABA, DEBT COLLECTION LAB, *THE UNEQUAL BURDEN OF DEBT CLAIMS* 4 (2023), <https://debtcollectionlab.org/docs/unequal-burden-of-debt-claims.pdf> [<https://perma.cc/K5AM-4T35>]; Lisa Stifler, *Debt in the Courts: The Scourge of Abusive Debt Collection Litigation and Possible Policy Solutions*, 11 HARV. L. & POL’Y REV. 91, 110–12 (2017).

164. *See supra* Part I.

165. This ordering reflects a change in my thinking. When I first wrote against debtors’ prisons, I began with a litigation strategy, leaving social movements for a few sentences in the conclusion. *See* Hampson, *supra* note 5, at 46–47. I now adhere to a different priority, at least in this context.

166. *See, e.g.*, Natapoff, *supra* note 37, at 1040–43.

courts are in fact unaware of the law. In an impressive study with disturbing results, Professor Sara Sternberg Greene and Dr. Kristen M. Renberg show that a staggering number of legal disputes are heard in courts where “no one, not even the judge, is aware of the law.”<sup>167</sup> The problem is compounded by the fact that plaintiffs in many state court debt-collection cases are giant repeat players. As Professor Daniel Wilf-Townsend has shown, state courts are awash in litigation brought by massive repeat filers that he terms “assembly-line plaintiffs”—a development that has significant normative concerns for debtors who are largely unrepresented in such lawsuits.<sup>168</sup>

Accordingly, legal professionals must first supervise legal institutions. One of the most effective interventions in the context of improper imprisonment for criminal legal financial obligations was the Supreme Court of Ohio’s promulgation of an information sheet, which laid out the obligations of the Ohio judiciary under the state and federal constitutions.<sup>169</sup> Here, too, supervisory bodies like state supreme courts have an important function in correcting unlawful behavior by legal actors.

Where that fails, litigation can come into play, especially when cases are brought by state attorneys general, who can focus fire on repeat offenders and shine a spotlight on the most egregious practices. Prosecutors have plenty of ammunition. State law proscribes malicious threats delivered with the intent to extort money.<sup>170</sup> And extortion statutes punish threats designed to “accuse, expose or otherwise injure.”<sup>171</sup> When the threatened conduct is

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167. Sara Sternberg Greene & Kristen M. Renberg, *Judging Without a J.D.*, 122 COLUM. L. REV. 1287, 1342 (2022); *see also id.* at 1289 n.2.

168. *See* Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1744–51 (2022); *see also* CLAIRE JOHNSON RABA, DEBT COLLECTION LAB, ONE-SIDED LITIGATION 5 (2023), <https://debtcollectionlab.org/docs/OneSidedLitigation.pdf> [<https://perma.cc/5KT3-BDZA>] (examining debt collection actions in California and revealing the prevalence of repeat players as creditors and debtors unrepresented by attorneys); Lauren Sudeall & Daniel Pasciuti, *Praxis and Paradox: Inside the Black Box of Eviction Court*, 74 VAND. L. REV. 1365, 1368 (2021) (describing legal proceedings in Georgia courts that function “as a vehicle for rent collection”). *See generally* Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC’Y REV. 95 (1974) (theorizing how repeat players, particularly corporate defendants, can accumulate advantages against one-time opponents in the litigation system). For an important response to Wilf-Townsend’s work that situates it within a textured sociological account of injustice in American society and proposes several ideas for transformational change, *see* Jessica K. Steinberg, Colleen F. Shanahan, Anna E. Carpenter & Alyx Mark, *The Democratic (Il)legitimacy of Assembly-Line Litigation*, 135 HARV. L. REV. F. 359, 372 (2022).

169. *See* SUP. CT. OF OHIO: OFF. OF JUD. SERVS., COLLECTION OF FINES AND COURT COSTS IN ADULT TRIAL COURTS (2021), <https://www.supremecourt.ohio.gov/docs/Publications/JCS/finestCourtCosts.pdf> [<https://perma.cc/3UK5-RK7L>]; Hampson, *supra* note 5, at 41; *see also* Jocelyn Rosnick & Mike Brickner, *The Ohio Model for Combatting Debtors’ Prisons*, 21 MICH. J. RACE & L. 375 (2016) (providing an overview of how Ohio has combatted debtors’ prisons).

170. *See, e.g.*, FLA. STAT. § 836.05 (2023); CAL. CIV. CODE § 1940.2(a)(2) (West 2023) (specifying that it is unlawful for a landlord to violate California’s extortion statute); *see also* 12 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, REAL PROPERTY § 640 (11th ed. 2023) (stating that landlords may not use “wilful threats” or “menacing conduct” to influence a tenant to vacate a dwelling).

171. *See, e.g.*, State v. McInnes, 153 So. 2d 854, 856 (Fla. Dist. Ct. App. 1963) (stating that it is immaterial whether a threat “is directed against the person to whom the threat is



unlawful, a debtor may be able to countersue for violations of the FDCPA or parallel state laws.<sup>172</sup>

Lastly, legal professionals should educate their communities about their legal rights. This is especially important when unlawful threats by creditors can be neutralized by individuals who know that the threats are unfounded or unlawful.<sup>173</sup>

### A. Redeemer Torts

Private plaintiff, civil actions against creditors who threaten harsh remedies face a challenging, uphill course. That said, if I am right about the ways that creditors intentionally draw redeemers into debt-collection actions, redeemers themselves may be able to sue creditors directly in what this Article calls “redeemer torts.” To be sure, the more direct claim—a counterclaim brought by the debtor—would be easier to prove.<sup>174</sup> But since the debtor is economically and legally vulnerable, we might expect them to be less assertive of their rights than a redeemer might be. And when the underlying facts indicate that the economic transaction was actually consummated between the redeemer and the creditor, with the debtor as a mere pass-through, the redeemer may have a cause of action.<sup>175</sup> Redeemers may be able to bring redeemer torts under a number of legal theories.

#### 1. Unjust Enrichment

First, when the redeemer has transferred money to the creditor (either directly or via the debtor), the redeemer may be able to sue the creditor for unjust enrichment. This theory is unavailable to the debtor, however, since courts generally find that payments made pursuant to a contract cannot be attacked as unjustly enriching the recipient.<sup>176</sup>

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communicated, or is directed against another,” as long as the threat is offered with an “intent to extort money or other pecuniary advantage”).

172. See 15 U.S.C. § 1692k (providing for civil liability for violating the provisions of the FDCPA). Further, as Brady Williams points out, unconscionable contracts are unlawful under California law. Brady Williams, *Unconscionability as a Sword: The Case for an Affirmative Cause of Action*, 107 CALIF. L. REV. 2015, 2041 (2019) (citing *De La Torre v. CashCall, Inc.*, 422 P.3d 1004 (Cal. 2018)).

173. For example, when a debtor could file for bankruptcy to discharge the debt, see *supra* notes 81–83 and accompanying text, or when the debt itself is unlawful.

174. Debtors could, of course, bring claims or defenses based on several theories, including unconscionability, see, e.g., Williams, *supra* note 172, at 2029, and breach of the duty of good faith and fair dealing.

175. The premise that courts will look to the economic reality of a transaction rather than its formalities is well established, both under statutory and common law. See, e.g., *Merit Mgmt. Grp. v. FTI Consulting, Inc.*, 138 S. Ct. 883, 892 (2018) (holding that “the only relevant transfer for purposes of the [11 U.S.C. § 546(e)] safe harbor is the transfer that the trustee seeks to avoid”).

176. A valid creditor has a contractual and legal right to repayment. This express contract precludes the application of an unjust enrichment claim from a debtor to a creditor. See, e.g., *Barfield v. APRO Int’l, Inc.*, 781 F. App’x 900, 903 (11th Cir. 2019) (“A claim for unjust enrichment is based on a legal fiction that implies the existence of a contract between the parties, even though they did not assent to one. Therefore, a claim for unjust enrichment

Even though an unjust enrichment theory might arm a redeemer with a cause of action, it would likely succeed only when the facts support the conclusion that the debtor was not obligated to pay, because (for example) the contractual provision was unconscionable or the debt collection mechanism was unlawful. A creditor entitled to repayment, conversely, has not been “unjustly enriched” even though the payment came from a third party.<sup>177</sup> Indeed, courts and commentators note that satisfying a debt owed to a third party could unjustly enrich the *debtor*, not the creditor.<sup>178</sup>

## 2. Abuse of Process

Second, when a creditor threatens criminal or civil action that is unrelated to debt collection, a redeemer may be able to sue for abuse of process. The abuse of process tort is “said to be the misuse of the legal process primarily to accomplish a purpose for which it was not designed.”<sup>179</sup> The underlying fact pattern typically involves a defendant compelling a victim to yield “by clearly wrongful conduct” or by using some form of extortion “to put pressure upon the other to compel him to pay a different debt or to take some other action or refrain from it.”<sup>180</sup> As described by the U.S. Court of Appeals for the Second Circuit, a claim for abuse of process “lies against a defendant who (1) employs regularly issued legal process to compel performance or forbearance of some act (2) with intent to do harm without excuse or justification, and (3) in order to obtain a collateral objective that is outside

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cannot be asserted if the parties entered into an express contract regarding the issue in dispute.”); *In re APA Assessment Fee Litig.*, 766 F.3d 39, 46 (D.C. Cir. 2014) (“Unjust enrichment will not lie when ‘the parties have a contract governing an aspect of [their] relation,’ because ‘a court will not displace the terms of that contract and impose some other duties not chosen by the parties.’” (quoting *Emerine v. Yancey*, 680 A.2d 1380, 1384 (D.C. 1996))); *Jordan Keys & Jessamy, LLP v. St. Paul Fire & Marine Ins. Co.*, 870 A.2d 58, 64 (D.C. Cir. 2005) (“One who has entered into a valid contract cannot be heard to complain that the contract is unjust, or that it unjustly enriches the party with whom he or she has reached agreement. The equities may be quite different, however, where A, who claims that B has been unjustly enriched at A’s expense, has a contract with C rather than with B.”); RESTATEMENT (THIRD) OF RESTITUTION § 2(2) (AM. L. INST. 2011) (“A valid contract defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment.”).

177. *See, e.g., In re Verizon Ins. Coverage Appeals*, 222 A.3d 566, 577 (Del. 2019) (“Unjust enrichment is ‘the unjust retention of a benefit to the loss of another, or the retention of money or property of another against the fundamental principles of justice or equity and good conscience.’” (quoting *Nemec v. Shrader*, 991 A.2d 1120, 1130 (Del. 2010)); *BNP Paribas Mortg. Corp. v. Bank of Am., N.A.*, 949 F. Supp. 2d 486, 514 (S.D.N.Y. 2013) (citing *B.E.L.T., Inc. v. Wachovia Corp.*, 403 F.3d 474, 477 (7th Cir. 2005)) (stating the rule that unjust enrichment is improper when a debtor repays obligations with money furnished by creditors).

178. *See, e.g.,* RESTATEMENT (FIRST) OF RESTITUTION § 1 cmt. b (AM. L. INST. 1937) (“A person confers a benefit upon another if he . . . satisfies a debt or a duty of the other . . . .”); *SEI Invs. Glob. Funds Servs. v. Citibank, N.A.*, 100 F. Supp. 3d 447, 457 (E.D. Pa. 2015) (“Where a party pays a debt owed by another, the latter party is enriched by the benefit of the satisfaction of his debt.”).

179. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *THE LAW OF TORTS* § 594 (2d ed. 2022).

180. *See id.*; RESTATEMENT (SECOND) OF TORTS § 682 (AM. L. INST. 1977).

the legitimate ends of the process.”<sup>181</sup> The collateral objective requirement “resembles a form of extortion”<sup>182</sup> and may include the “infliction of economic harm, extortion, blackmail [or] retribution.”<sup>183</sup> To succeed in such a tort, redeemers would need to show that the creditor intended to compel them to repay on the debt—a challenging, but not insurmountable, evidentiary obstacle.

The other key question in such a redeemer tort would be standing. In some states, a redeemer may have standing when the redeemer is a defendant in the creditor’s lawsuit or the redeemer’s property is attached, seized, or otherwise affected by the legal process.<sup>184</sup>

### 3. Civil Extortion

Third, when the threat of cruel debt collection measures is expressly aimed at a redeemer, a redeemer may be able to sue the creditor for civil extortion. As noted above, civil extortion statutes punish threats designed to “accuse, expose or otherwise injure,” even if the threat is aimed at a different person than the target of the extortion.<sup>185</sup>

Under this theory, a creditor who communicates a threat to imprison, ruin, or deport the debtor of a friend, family, or community member may stand in jeopardy of civil liability for extortion. Of course, such a threat is unlikely to be conveyed directly. More likely, the creditor will convey a threat to the debtor, and the debtor will then convey the creditor’s threat to the third-party redeemer. In such a situation, the mens rea requirement for extortion likely would not be met (nor would criminal sanctions seem advisable against the debtor).<sup>186</sup> Still, one can readily imagine situations in which a creditor’s threat is expressly aimed at a redeemer: “Tell your parents to help you out or I am calling ICE.”

Even based on the clearest fact pattern imaginable, redeemer torts for civil extortion would face numerous hurdles. Many states, for example, do not recognize civil causes of action for extortion,<sup>187</sup> and the relevant federal

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181. *Folk v. City of New York*, 243 F. Supp. 3d 363, 375 (E.D.N.Y. 2017) (citing *Cook v. Sheldon*, 41 F.3d 73, 80 (2d Cir. 1994)).

182. *Id.* (quoting *Krebs v. United States*, No. 98-CV-2590, 1999 WL 185263, at \*5 (S.D.N.Y. Mar. 31, 1999)).

183. *Id.* (quoting *Brandon v. City of New York*, 705 F. Supp. 2d 261, 275 (S.D.N.Y. 2010); see also *Hopper v. Drysdale*, 524 F. Supp. 1039, 1042 (D. Mont. 1981) (holding that the plaintiff properly pled an abuse of process claim by alleging that the defendant noticed his deposition only to secure his presence in the county for arrest)).

184. See *DOBBS ET AL.*, *supra* note 179, § 594 (“The victim might even be a person who is not sued at all but who is directly affected by the process . . . or a *lis pendens* is filed that ties up property of a person against whom no suit has been filed.”).

185. *State v. McInnes*, 153 So. 2d 854, 856 (Fla. Dist. Ct. App. 1963); see also *supra* notes 170–71 and accompanying text.

186. See, e.g., *O’Flaherty-Lewis v. State*, 230 So. 3d 15, 18 (Fla. Dist. Ct. App. 2017) (“[D]irect evidence of intent is rare, and intent is usually proven through inference.” (quoting *Manuel v. State*, 16 So. 3d 833, 835 (Fla. Dist. Ct. App. 2005))).

187. See, e.g., *Kennedy Ship & Repair, L.P. v. Loc Tran*, 256 F. Supp. 2d 678, 686 (S.D. Tex. 2003) (“Without any authority supporting the proposition that Texas recognizes a civil cause of action for extortion, the Court is not obliged to do so now.”); *Cunningham v. Politi*,

statute (the Hobbs Act<sup>188</sup>) contains no civil cause of action either.<sup>189</sup> Even where states have recognized causes of action, plaintiffs must meet high bars in their pleadings. For example, a civil action for extortion in California requires a showing of fraud,<sup>190</sup> which in turn requires a heightened pleading standard.<sup>191</sup>

### B. Direct Regulation of Harsh Creditor Remedies

Beyond the legal avenues by which redeemers may sue harsh creditors directly, this part details some subject-matter-specific proposals for legal reform, tackling each of the four harsh creditor remedies that have been the focus of this Article.

#### 1. Abolish Imprisonment for Civil Debt

Imprisonment for civil debt is, of course, a sufficiently harsh creditor sanction that it has the likely effect of compelling third parties to repay on the debtor's behalf. The historical and contemporary evidence is overwhelming that this sanction readily can, and does, induce such payments. As I have noted previously, “[t]he threat of imprisonment may create a hostage effect, causing debtors to hand over money from disability and welfare checks, or inducing family members and friends—who aren’t legally responsible for the debt—to scrape together the money.”<sup>192</sup> The ACLU’s report on imprisonment for civil debt discussed above refers throughout to third-party payments, made by family, friends, and even some well-meaning strangers.<sup>193</sup>

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No. 18-CV-00362, 2019 WL 2517085, at \*10 (E.D. Tex. Apr. 30, 2019), *report and recommendation adopted*, No. 18-CV-362, 2019 WL 2524737 (E.D. Tex. June 19, 2019); *Zueger v. Goss*, 343 P.3d 1028, 1037–38 (Colo. App. 2014) (acknowledging that Colorado does not have a civil extortion statute but not deciding whether it is a viable claim for relief).

188. 18 U.S.C. § 1951.

189. *See, e.g.,* *Abcarian v. Levine*, 972 F.3d 1019, 1026 (9th Cir. 2020).

190. *See, e.g.,* *Intermarketing Media, LLC v. Barlow*, No. 20-CV-00889, 2021 WL 5990190, at \*12 (C.D. Cal. May 4, 2021); *Doiron v. City of Santa Ana*, No. 17-CV-01584, 2018 WL 10699640, at \*12 (C.D. Cal. Sept. 24, 2018) (declining to dismiss claim where defendant allegedly “procured \$1,500 from [plaintiff] by extorting him with the threat of arrest for crimes that he knew [plaintiff] did not commit,” noting that “California recognizes ‘a civil cause of action for the recovery of money obtained by the wrongful threat of criminal or civil prosecution, whether the claim is denominated by ‘extortion, menace, or duress.’” (quoting *Monex Deposit Co. v. Gilliam*, 666 F. Supp. 2d 1135, 1136 (C.D. Cal. 2000))).

191. *See Barlow*, 2021 WL 5990190, at \*13.

192. *Hampson*, *supra* note 27, at 1025; *see also* *Hampson*, *supra* note 5, at 28 (“[A]s in the context of commercial debtors’ prisons, ‘ability to pay’ is not endogenous to the sanctions wielded against the debtor: here, as there, the threat of imprisonment increases the risk that the debtor will turn to family, friends, or church—people and institutions not legally obligated to pay—or to illegal sources of money.”); *Campbell Robertson, Suit Alleges ‘Scheme’ in Criminal Costs Borne by New Orleans’s Poor*, N.Y. TIMES (Sept. 17, 2015), <https://www.nytimes.com/2015/09/18/us/suit-alleges-scheme-in-criminal-costs-borne-by-new-orleans-poor.html> [<https://perma.cc/TQ5K-X29R>] (describing how a debtor’s mother and sister “scraped together what money they [could]”).

193. *See, e.g.,* TURNER, *supra* note 12, at 35.

Yet all fifty states have banned imprisonment for civil debt, with some variation in the details.<sup>194</sup> Forty-one of the fifty states have bans in their state constitutions, and the remaining states have statutory bans on imprisonment for debt.<sup>195</sup> Some of those states banned the ancient writ of *capias ad satisfaciendum*.<sup>196</sup>

Today, the ancient writ of *capias ad satisfaciendum* is all but extinct.<sup>197</sup> But imprisonment for civil debt can still be effectuated under the label of contempt of court. Repairing the wall in this context means erecting clear, administrable distinctions between imprisonment for inability to pay and failure to show.

#### *a. Constraints on Contempt of Court*

States follow one of two approaches to bans on imprisonment when it comes to failure to pay.<sup>198</sup> First, under the “no-hearing rule,” the burden is on creditors to pursue execution proceedings through any lawful means apart from imprisonment.<sup>199</sup> Second, under the “specific, non-exempt assets rule,” creditors may seek contempt of court only after they have identified a

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194. Hampson, *supra* note 5, at 14–24. The problem becomes particularly acute in the domain of family law, which stands as an “intricate tapestry” formed of “strands of civil and criminal law.” Elizabeth D. Katz, *Criminal Law in a Civil Guise: The Evolution of Family Courts and Support Laws*, 86 U. CHI. L. REV. 1241, 1309 (2019). As Professor Elizabeth D. Katz’s historical analysis demonstrates, the evolution of family law contained strong movements toward criminalization as well as “civil” support enforcement. *See id.* at 1279–1300. The ramifications for recognizing the criminal-civil overlap in family law, Katz argues, are complex. *See id.* at 1307–09. Despite that complexity, most states include an exception from the bans on debtors’ prison for child support debt. *See* Cortney E. Lollar, *Criminalizing (Poor) Fatherhood*, 70 ALA. L. REV. 125, 145 (2018). Professor Cortney E. Lollar has advocated for the abolition of that carve-out to ensure that courts do not punish poor fathers for their poverty. *See id.* at 175–77.

195. Hampson, *supra* note 5, at 20; *see also* Christopher D. Hampson, Note, *State Bans on Debtors’ Prisons and Criminal Justice Debt*, 129 HARV. L. REV. F. 153 app. (2016).

196. The writ is also referred to, in shorthand, as “*capias*” or “*ca. sa.*” *See, e.g.*, W. VA. CODE § 56-3-2 (2023) (“The . . . writ of *capias ad satisfaciendum* [is] abolished and shall not hereafter be issued.”); VA. CODE ANN. § 8.01-467 (2023) (“No . . . writ of *capias ad satisfaciendum* . . . shall be issued hereafter.”); *see also* Hampson, *supra* note 5, at 19–21 (discussing the course of state and federal legislation on the subject); Shepard, *supra* note 44, at 1522 n.50. This included the federal government, which in 1832 banned the writ in the District of Columbia and the territories, *see* H.R. REP. NO. 22-5, at 1–13 (1832), and in 1839 banned imprisonment for debt in federal cases proceeding in states that had banned the practice, *see* Act of Feb. 28, 1839, ch. 35, 5 Stat. 321.

197. *See* Hampson, *supra* note 5, at 21. Some states still issue the closely related writ of *capias ad respondendum* to compel debtors to come to the courthouse for an examination of their assets.

198. *See id.* at 38; *see also* Hampson, *supra* note 27, at 1037–38.

199. *See, e.g., In re Nichols*, 749 So. 2d 68, 72 (Miss. 1999) (“The [creditors] are free to collect the judgment by execution, garnishment or any other available lawful means so long as it does not include imprisonment.”). Such a rule avoids the costs inherent in judicial ability-to-pay determinations. *See, e.g.,* Dan B. Dobbs, *Contempt of Court: A Survey*, 56 CORNELL L. REV. 183, 272 (1971); *see also id.* at 273 (noting that “[s]tatutes in several states forbid the use of contempt imprisonments to enforce money judgment that can be enforced in other ways”).

specific, non-exempt asset that the debtor actively refuses to turn over.<sup>200</sup> As Professor Alexandra Natapoff suggests, state legislators could codify this outcome (where they have not already) through this language: “No defendant shall be incarcerated for civil contempt or given extended supervision or probation solely because of a failure to make full payments of fees, fines, or costs under this provision.”<sup>201</sup>

Even when creditors and courts honor these substantive rules (and they frequently do not), it is the procedural rules that often trip up debtors. Creditors are entitled to “proceedings supplementary,” by which they may summon their debtors to court to testify concerning the assets that may be seized to satisfy the judgment.<sup>202</sup> Failure to comply with such procedural rules can lead to civil or criminal contempt.<sup>203</sup> For many debtors, attending such court hearings is a heavy burden, requiring time off from work and away from family. Creditors should not be allowed to abuse proceedings supplementary in an effort to harass debtors. As the Court of Appeals of Indiana put it in *Grace Whitney Properties*, “a creditor cannot require a debtor to attend ongoing proceedings supplemental hearings and be reexamined continuously as to whether the debtor has acquired any new assets or income.”<sup>204</sup> Similarly, courts should ensure that debtors receive proper and adequate notice of the hearing before issuing arrest warrants for failure to show.<sup>205</sup>

These guidelines may apply even in states without express bans on debtors’ prisons in their constitutions. The Connecticut Supreme Court ruled in *Pease v. Charlotte Hungerford Hospital*<sup>206</sup> that courts cannot hold a litigant in civil contempt “merely for failure to pay an award of costs or

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200. See Hampson, *supra* note 27, at 1037 n.117 (collecting sources). Even when a debtor refuses to turn over specific, nonexempt assets, some courts have found that after a substantial period of detention and noncompliance, the debtor may attempt to show that there is no realistic possibility of compliance: if so, the coercive force of the remedy is extinguished and any further imprisonment becomes punitive, requiring the protections of criminal contempt. See, e.g., *Commodity Fut. Trad. Comm’n v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1530–31 (11th Cir. 1992).

201. Alexandra Natapoff, *Misdemeanor Decriminalization*, 68 VAND. L. REV. 1055, 1112 (2015). Indeed, as Professor Lauren Sudeall aptly notes, we might even remove some bulk of debt collection cases from the civil litigation system altogether by “off-ramp[ing]” cases to alternative dispute resolution or other social support systems. Lauren Sudeall, *Delegalization*, 75 STAN. L. REV. ONLINE 116, 131 (2023).

202. See, e.g., FLA. STAT. § 56.29 (2023).

203. See, e.g., *United States v. Donziger*, 38 F.4th 290, 304–06 (2d Cir. 2022).

204. *Carter v. Grace Whitney Props.*, 939 N.E.2d 630, 637 (Ind. Ct. App. 2010); see also *Kirk v. Monroe Cnty. Tire*, 585 N.E.2d 1366, 1369 (Ind. Ct. App. 1992) (“[E]ven if we were to assume that the first proceedings supplemental was not a bar to the second, this does not mean that Kirk, whose finances have remained unchanged since April 15, 1991, should be required to attend ongoing proceedings supplemental hearings and be reexamined continuously as to whether he has acquired any new assets or income. A second order or examination of the debtor requires a showing by the creditor that new facts justifying a new order or examination have come to the knowledge of the creditor.”).

205. See TURNER, *supra* note 12, at 4, 21–23.

206. 157 A.3d 1125 (Conn. 2017).

satisfy a routine monetary judgment” absent a showing of wilful nonpayment or extraordinary circumstances.<sup>207</sup>

Shepard proposes two additional measures to increase compliance: (1) judges should review in-court payment plans and settlements to make sure debtors are not forfeiting exempt property; and (2) bond money used to secure attendance at contempt hearings should go to the court, not the creditor.<sup>208</sup> Indeed, using bond money to repay the debt advances what Shepard calls “contempt confusion,” defined as the “conflation of nonappearance and nonpayment contempt.”<sup>209</sup> As Professor Alan White put it, “[i]f . . . people are being incarcerated until they pay bail, and bail is being used to pay their debts, then they’re being incarcerated to pay their debts.”<sup>210</sup>

Courts do, of course, retain the inherent authority to enforce orders to appear through contempt sanctions. But debtors often face contempt of court without an attorney.<sup>211</sup> Given the risk of loss of liberty that these proceedings pose, due process under state or federal law may well require that the court appoint such debtors an attorney.<sup>212</sup>

#### *b. Litigating Debtors’ Prisons in a Federalist System*

Breaches of the principles sketched out above violate each state’s ban on imprisonment for debt, whether that ban is statutory or constitutional. But such violations also implicate federal law in two ways.

First, when the action is brought by a debt collector,<sup>213</sup> threatening or seeking unlawful imprisonment for debt violates the FDCPA. Section 1692e of the FDCPA prohibits debt collectors from “represent[ing] or impl[y]ing that nonpayment of any debt will result in the arrest or imprisonment of any person . . . unless such action is lawful,”<sup>214</sup> and courts have held that unlawful threats under state law give rise to a federal cause of action under the FDCPA.<sup>215</sup>

207. *Id.* at 1131, 1133.

208. Shepard, *supra* note 44, at 1520.

209. *Id.* at 1550.

210. Chris Serres, *Is Jailing Debtors the Same as Debtors Jail?*, STAR TRIB., June 6, 2010, at A9.

211. *See, e.g.*, Shepard, *supra* note 44, at 1533.

212. In *Turner v. Rogers*, the U.S. Supreme Court held that the Due Process Clause of the Fourteenth Amendment requires that a state provide certain alternative procedures to indigent parents who might be imprisoned for failure to pay a child support order. 564 U.S. 431, 435, 441–42 (2011); *see also* Dep’t of Revenue Child Support Enf’t v. Grullon, 147 N.E.2d 1066, 1073 (Mass. 2020) (ruling against the family court that failed to provide a child support debtor with the required *Turner* procedures); *Commonwealth v. Gomes*, 552 N.E.2d 101, 104–05 (Mass. 1990) (holding that no one may be imprisoned without the right to counsel).

213. *See* 15 U.S.C. § 1692a(6) (defining “debt collector”); *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1718 (2017) (holding that entities who regularly purchase debts and then seek to collect on those accounts are not “debt collectors” subject to the FDCPA).

214. 15 U.S.C. § 1692e(4).

215. *See, e.g.*, *Smith v. LVNV Funding, LLC*, 894 F. Supp. 2d 1045, 1050 (E.D. Tenn. 2012) (“[B]ecause the FDCPA forbids a debt collector from threatening an action that cannot legally be taken, the threat to take (or the taking) of an action an entity could not legally take

Second, imprisonment for civil debt violates federal substantive due process under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution.<sup>216</sup> Even after the U.S. Supreme Court's recent curtailing of substantive due process rights in *Dobbs*, the Due Process Clause analysis still—at a minimum—looks to “whether the right is ‘deeply rooted in [our] history and tradition’ and whether it is essential to our Nation’s ‘scheme of ordered liberty.’”<sup>217</sup>

*Dobbs* purports to maintain the test of *Washington v. Glucksberg*,<sup>218</sup> under which the Due Process Clause protects fundamental rights and liberties which are “deeply rooted in this Nation’s history and tradition” and “implicit in the concept of ordered liberty.”<sup>219</sup> The *Dobbs* Court also expressly approved of the analysis in *Timbs v. Indiana*,<sup>220</sup> which pointed to “35 of the 37” state constitutions in effect at the ratification of the Fourteenth Amendment,<sup>221</sup> and in *McDonald v. City of Chicago*,<sup>222</sup> which pointed to “22 of the 37 States.”<sup>223</sup>

A constitutional ban on imprisonment for civil debt readily clears the *Glucksberg* test. First, the right not to be imprisoned for debt is indeed “deeply rooted in this Nation’s history and tradition.” True, at common law, judgment debtors had no right to avoid imprisonment for civil debt: arrest and imprisonment for civil debt was a common mechanism in English courts.<sup>224</sup> England’s first enacted statute providing for the post-judgment imprisonment of a civil debtor, the Statute of Acton Burnel,<sup>225</sup> even referenced its coercive power over redeemers, “stating that imprisonment of

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without being properly licensed may support a federal cause of action under the FDCPA.” (citation omitted)); *see also* Shepard, *supra* note 44, at 1540.

216. U.S. CONST. amend. XIV, § 1. The argument I make in this section merits its own law review article, which is a work-in-progress under the title “Debtors’ Prisons and the Reconstruction Amendments.”

217. *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2246 (2022) (quoting *Timbs v. Indiana*, 139 S. Ct. 682, 686 (2019)).

218. 521 U.S. 702 (1997).

219. *Dobbs*, 142 S. Ct. at 2242 (quoting *Glucksberg*, 521 U.S. at 721); *see also, e.g.*, *Duncan v. Louisiana*, 391 U.S. 145, 148 (1968) (asking whether “a right is among those ‘fundamental principles of liberty and justice which lie at the base of all our civil and political institutions’” (quoting *Powell v. Alabama*, 287 U.S. 45, 67 (1932))); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (requiring a “principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental” (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934))).

220. 139 S. Ct. 682 (2019).

221. *Id.* at 688.

222. 561 U.S. 742 (2010).

223. *Id.* at 777; *see Dobbs*, 142 S. Ct. at 2246–47.

224. *See* Richard Ford, *Imprisonment for Debt*, 25 MICH. L. REV. 24, 26–27 (1926). Roman law also contained no protection from imprisonment for debt. Every lawsuit in Roman law commenced with a plaintiff arresting his adversary and securing a judgment in court. *Id.* at 24. Creditors then used the judgment as leverage to secure payment for unpaid debt. *Id.* at 25. If the debt remained unpaid, debtors could remain in prison for up to sixty days, be sold into slavery, or even be killed. *Id.* at 24–25 (citing WILLIAM ALEXANDER HUNTER, A SYSTEMATIC AND HISTORICAL EXPOSITION OF ROMAN LAW 968 (2d ed. 1885); SHELDON AMOS, THE HISTORY AND PRINCIPLES OF THE CIVIL LAW OF ROME 381 (1883)).

225. 11 Edw. I (1283); 13 Edw. I (1285).



a debtor should continue until he ‘made agreement (with his creditors) or his friends for him.’”<sup>226</sup> Finding ways to evade this coercive punishment, many debtors fled the country.<sup>227</sup>

During the colonial era, the North American colonies, especially Georgia, gained a reputation as a safe haven for debtors.<sup>228</sup> Indeed, as Professor Bruce H. Mann points out, there were no debtors’ prisons in the United States until after the Revolutionary War.<sup>229</sup> Unlike in England, the colonies had at most a “room set aside for debtors in a jail otherwise filled with criminals awaiting trial.”<sup>230</sup> Nonetheless, as the colonies began to accumulate wealth toward the end of the eighteenth century and into the nineteenth, creditors used imprisonment for debt more and more often.<sup>231</sup> As they did so, a nascent abolitionist movement began to point out the cruelty and inefficiency of the practice.<sup>232</sup>

Like the federal Constitution at the time, most states “neglected to provide constitutional protections to debtors.”<sup>233</sup> Following westward expansion, however, “every state that entered the Union in the eighteenth century included language on debtors’ prisons in their inaugural constitutions,” typically providing that debtors could escape prison if they turned their estates over to their creditors.<sup>234</sup> Despite the prevalence of these limited constitutional protections, laws without societal support could turn into mere “parchment barriers”—a point made by President Madison, who bailed his

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226. Jay Cohen, *The History of Imprisonment for Debt and Its Relation to the Development of Discharge in Bankruptcy*, 3 J. LEGAL HIST. 153, 155 (1982) (locating the Statute of Acton Burnel at 11 or 13 Edw. I (1283 or 1285)); see also Vern Countryman, *A History of American Bankruptcy Law*, 81 COM. L.J. 226, 226 (1976) (“Two years later the Statute of Merchants simplified matters by authorizing immediate imprisonment of the debtor on default of the bond.” (citing 13 Edw. I, stat. 3 (1285))).

227. See Countryman, *supra* note 226, at 228.

228. See Ford, *supra* note 224, at 28 (“General Oglethorpe, a prominent philanthropist and one of the first to become interested in the relief of debtors, promoted the colony of Georgia as a place where debtors might begin life anew.”).

229. See MANN, *supra* note 139, at 85.

230. *Id.*

231. See Hampson, *supra* note 5, at 15; Nino C. Monea, *A Constitutional History of Debtors’ Prisons*, 14 DREXEL L. REV. 1, 8 (2022) (citing Neil L. Sobol, *Charging the Poor: Criminal Justice Debt & Modern-Day Debtors’ Prisons*, 75 MD. L. REV. 486, 496 (2016)).

232. See Hampson, *supra* note 5, at 18.

233. Monea, *supra* note 231, at 23. Only Pennsylvania and North Carolina adopted provisions protecting debtors at this time, providing that debtors could be released from debtors’ prison if they turned over their estate for the benefit of creditors. See *id.* at 24–25 (citing PA. CONST. of 1776, § 28; N.C. CONST. of 1776, § 39); see also S. Laurence Shaiman, *The History of Imprisonment for Debt and Insolvency Laws in Pennsylvania as They Evolved from the Common Law*, 4 AM. J. LEGAL HIST. 205, 214 (1960) (“Each of the succeeding Pennsylvania Constitutions contained almost identical provisions.”).

234. Monea, *supra* note 231, at 26; see also *id.* at 26 nn.167–73 (citing VT. CONST. of 1793, ch. 2, § 33; KY. CONST. of 1792, art. XII, § 17; TENN. CONST. of 1796, art. 16, § 18; TENN. CONST. of 1796, art. 11, § 18; OHIO CONST. of 1802, art. VIII, § 15).

stepson out of a Philadelphia debtors' prison in 1830.<sup>235</sup> Widespread imprisonment for debt was commonplace until the turn of the century.<sup>236</sup>

At the beginning of the nineteenth century, "[t]he frequency and ferocity of attacks on the system of debtors' prisons grew."<sup>237</sup> Captain Nino C. Monea's analysis of contemporary newspapers reveals a barrage of criticisms of the harsh, uncivilized conditions that existed in debtors' prisons.<sup>238</sup> Abolitionists assailed debtors' prisons as ineffective and violative of due process.<sup>239</sup> The groundswell of public opposition produced legal reform. Kentucky first abolished debtors' prisons in 1821, and many other states, as well as the federal government, followed suit in the 1830s and 1840s.<sup>240</sup>

The Fourteenth Amendment, ratified in 1868, came in the wake not only of the Civil War, but also of the nationwide movement to abolish imprisonment for debt. Indeed, Reconstruction accelerated the movement against debtors' prisons, since the former Confederate states would rejoin the Union with new constitutions passed by progressive coalitions that, by act of Congress, included freedmen and excluded confederates.<sup>241</sup> Those

235. Sanford Levinson, *America's "Other Constitutions": The Importance of State Constitutions for Our Law and Politics*, 45 TULSA L. REV. 813, 818 (2011); see also *supra* note 146 and accompanying text.

236. See Monea, *supra* note 231, at 28–30. Captain Nino C. Monea explains that "some debtors preferred loss of liberty over loss of property," *id.* at 28, and that some even chose to remain in prison out of principle. *Id.* at 28–30. Moreover, many court systems resisted these debtors' reforms. *Id.*

237. *Id.* at 30–31 (comparing prevalence of "imprisonment for debt" in U.S. newspapers between 1770 and 1817, 1818 and 1823, and 1836 and 1841, and noting an exponential growth in coverage); see also Ford, *supra* note 224, at 32 ("In America, as we have said, there was a general movement for the relief of debtors soon after 1830."); Countryman, *supra* note 226, at 229 ("But a wave of reform in the 1830's led to state constitutional provisions forbidding imprisonment for debt.").

238. See Monea, *supra* note 231, at 31–37. Monea analyzed a series of editorials and news reports from the time. See, e.g., Editorial, U.S. GAZETTE (Phila.), Jan. 6, 1826, at 4, <https://www.newspapers.com/image/605130443/> [<https://perma.cc/MQ4N-JQRC>] (describing an 82-year-old man from Worcester, Massachusetts who died in a debtors' prison and attacking the institution as "confound[ing] crime with misfortune"); Editorial, AURORA GEN. ADVERTISER, July 27, 1807, at 2, <https://www.newspapers.com/image/586581278/> [<https://perma.cc/U6TD-QKK9>] (noting that a teenager had been sent to debtors' prison for \$8 that he owed for clothes); Editorial, EVENING POST (N.Y.C.), June 14, 1804, at 3, <https://www.newspapers.com/image/33513082> [<https://perma.cc/ES4P-5G2Z>] (describing the debtors' prison as "unsupportably filthy"); Editorial, U.S. GAZETTE (Phila.), Jan. 28, 1831, at 4, <https://www.newspapers.com/image/605059614/> [<https://perma.cc/CXD4-FB9L>] (condemning debtors' prisons as "a discreditable remnant of barbarism, descended to us from the dark ages of antiquity, which ought long since to have vanished on the advance of civilization and the light of knowledge"); *Imprisonment for Debt*, LONG-ISLAND STAR, Feb. 9, 1831, at 1, <https://www.newspapers.com/image/117450865/> [<https://perma.cc/5SL4-WHQG>] (panning imprisonment for debt for violating the U.S. Constitution).

239. See Monea, *supra* note 231, at 37 ("As far back as 1772, there are newspaper articles in London criticizing the sheriff for throwing debtors in jail before a jury had a chance to weigh in on the matter."); see also, e.g., Editorial, U.S. GAZETTE (Phila.), Jan. 28, 1831, at 4, <https://www.newspapers.com/image/605059614/> [<https://perma.cc/6HT7-UGW8>] (stating that imprisonment for debt had a 90 percent failure rate).

240. Hampson, *supra* note 5, at 18–19; see also Charles Jordan Tabb, *The History of the Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5, 16 (1995).

241. See Monea, *supra* note 231, at 47.

constitutions included much stronger bans on debtors' prisons than the South had yet seen.<sup>242</sup> The pattern continued during westward expansion across the North American continent.<sup>243</sup> The reader may review the current list of forty-one state constitutional bans in an appendix published by the *Harvard Law Review Forum*.<sup>244</sup> As I have pointed out elsewhere, the constitutions of many American Indian tribes, such as the Choctaw Nation of Oklahoma and the Chickasaw Nation, also ban imprisonment for debt.<sup>245</sup>

Second, returning to the *Glucksberg* test, the right not to be imprisoned for debt is "implicit in the concept of ordered liberty." As Judge Guido Calabresi and Professor A. Douglas Melamed observed in the *Harvard Law Review* in 1972, and as Natapoff observed in the same journal almost fifty years later, the distinctions between property rules and liability rules, and between criminal law and civil law, underlie much of the American legal system.<sup>246</sup> Indeed, some legal historical analysis has suggested that "civil arrest was a relic of the time when there was no clear distinction between civil and criminal law."<sup>247</sup> That a civil debt collector might be able to threaten such a harsh deprivation of liberty that the debtor would be entitled to representation under the Due Process Clause is evidence enough.<sup>248</sup>

Such federal claims allow debtors or their redeemers to bring their claims in federal court,<sup>249</sup> a procedural move that may be helpful either when state law is less protective than the federal standard or when state or local courts have fallen into a pattern of failing to apply state law.

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242. See *id.* at 43 (citing JOHN J. DINAN, *THE AMERICAN STATE CONSTITUTIONAL TRADITION* 9–10 (4th ed. 2006)). Florida's first ban on debtors' prison came in its Reconstruction constitution in 1868. See Hampson, *supra* note 5, at 21 (citing FLA. CONST. art. I, § 15 (1868)). As Monea notes, "[b]y the time the Southern states reentered the Union . . . twenty-eight out of thirty-seven states had constitutional protections." Monea, *supra* note 231, at 48–49.

243. By the 1870s, almost all the states then part of the Union had discontinued the practice. Hampson, *supra* note 5, at 19; see also Note, *Body Attachment and Body Execution: Forgotten but Not Gone*, 17 WM. & MARY L. REV. 543, 550 (1976); PETER J. COLEMAN, *DEBTORS AND CREDITORS IN AMERICA* 256–57 (1974). Western territories (including Alaska and Hawaii) had bans on debtors' prisons by act of Congress, and they included such bans in their constitutions upon admittance to the Union. See Hampson, *supra* note 5, at 21.

244. Hampson, *supra* note 195.

245. See Hampson, *supra* note 5, at 21 (citing CHOCTAW CONST. art. I, § 12; CHICKASAW CONST. art. I, § 12).

246. Calabresi & Melamed, *supra* note 37; Natapoff, *supra* note 37, at 1039; see also Shepard, *supra* note 44, at 1540 ("Some of these prohibited practices reflect a tendency among certain debt collectors to conflate civil and criminal liability in an attempt to shame or scare debtors into repaying debts.").

247. Ford, *supra* note 224, at 26–27 (citing John C. Fox, *Process of Imprisonment at Common Law*, 39 L.Q. REV. 46, 56–57 (1926)).

248. The Due Process Clause has also produced a string of cases requiring judges to conduct ability-to-pay hearings on the record before turning nonpayment of criminal fines, fees, and costs into a jail sentence. See *Williams v. Illinois*, 399 U.S. 235 (1970); *Tate v. Short*, 401 U.S. 395 (1971); *Bearden v. Georgia*, 461 U.S. 660 (1982); see also Hampson, *supra* note 5, at 33–35. Surely those protections, applicable in criminal cases, should apply a fortiori in civil ones.

249. A complaint alleging violations of the FDCPA presents a federal question on its face. See 28 U.S.C. § 1331. More directly, an incarcerated debtor could file a petition for a writ of habeas corpus. See *id.* § 2241.

## 2. Structure Eviction and Foreclosure Proceedings

Unlike imprisonment for debt, eviction and foreclosure cannot be avoided entirely: property owners and landlords have the right to take possession of their property. Still, eviction proceedings can and should be structured so that they avoid becoming, in effect, mechanisms for making debtors homeless or destitute—harsh creditor remedies that have the likely effect of compelling third-party redeemers to step into the breach.

In consumer cases, distraint should go the way of debtors' prisons and the dodo.<sup>250</sup> With adequate notice, property should be moved to the curb or to a storage facility—as is the law in many states.<sup>251</sup> But liens of distress for rent, which arise suddenly and secretly upon default, effectively render households destitute, giving the landlord the hostage value of the debtor's possessions and a powerful tool to extract payment not only from the debtor, but also from redeemers.

Mississippi made improvements after *Conner v. Alltin*,<sup>252</sup> but it did not formally abolish distraint in consumer cases. Mississippi Senate Bill 2461 improved the notices required for distraint and created a seven-day period after judgment during which the tenant must vacate the premises.<sup>253</sup> After the seven-day notice period, the landlord may request a warrant for removal, and seventy-two hours after that, all property left on the premises “shall be deemed abandoned and may be disposed of by the landlord without further notice or obligation to the tenant.”<sup>254</sup> But Mississippi's Residential Landlord and Tenant Act,<sup>255</sup> in which the new provisions live, expressly preserves “remedies at law or in equity not prohibited by this chapter,”<sup>256</sup> and the general Landlord-Tenant section of the Mississippi Code still gives landlords a first-priority lien on all personal property situated on the leased premises<sup>257</sup> plus the ability to sue for distraint, subject to a double-value bond.<sup>258</sup>

As for the timing and pace of eviction cases, although state law typically gives tenants time to vacate the premises,<sup>259</sup> “civil probation” systems, like

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250. To my mind, the policy analysis plays out differently in a business case. Florida, for example, allows liens of distress for rent, but only for business tenants. *See* FLA. STAT. §§ 83.11–12 (2023).

251. *See, e.g., id.* § 83.62(2) (“At the time the sheriff executes the writ of possession or at any time thereafter, the landlord or the landlord’s agent may remove any personal property found on the premises to or near the property line. Subsequent to executing the writ of possession, the landlord may request the sheriff to stand by to keep the peace while the landlord changes the locks and removes the personal property from the premises.”).

252. 571 F. Supp. 3d 544 (N.D. Miss. 2021).

253. *See* S.B. 2461, 2022 Leg., Reg. Sess. (Miss. 2022); MISS. CODE ANN. § 89-7-35(1) (2023).

254. MISS. CODE ANN. § 89-7-35(4) (2023).

255. *Id.* § 89-8-1 to -29.

256. *Id.* § 89-8-3(1).

257. *See id.* § 89-7-51(2).

258. *Id.* § 89-7-55.

259. *See, e.g.,* MASS. UNIF. SUMMARY PROCESS R. 13 (providing that “[e]xecution shall issue upon application, but not prior to the termination of the time limits imposed by applicable law”).

the one Summers discovered in the Eastern Housing Court of Massachusetts, replace those default rules with a “shadow legal system.”<sup>260</sup> These civil probation systems seem calculated to extract payments from third-party redeemers.<sup>261</sup> Even if the formal eviction proceeding provides enough time for a family to move, agreements for judgment allow tenants to reinstate their residency—an outward signal that “all is well”—but the residency is now subject to the landlord’s ability to evict at lightning speed. When the landlord ultimately files a motion for execution, third-party redeemers may well feel obligated to assist.

Summers suggests expanding the right to counsel, an active judicial model for unrepresented parties, and the right to cure.<sup>262</sup> As she proposes, additional research into whether housing courts serve as a “meaningful buffer against eviction” or merely “greenlight” evictions is sorely needed.<sup>263</sup> Beyond those sensible reforms, judges should consider two additional measures aimed at reducing the risk of compelled redemption. *First*, judges should hear possession by motion on the same timeframe as possession after trial,<sup>264</sup> and *second*, judges should hold nondisclaimable any rights to equitable delay in execution for the elderly, disabled, and households with children.<sup>265</sup>

In the foreclosure context, courts should insist on adequate notice, ensure that a right of redemption is provided, and require that any surplus from a forced sale goes to the homeowner.

### 3. Undercut Human Rights Violations

Lastly, the legal system should undercut creditor attempts to threaten deportation to compel funds from debtors and third-party redeemers. To some degree, the law in states like Massachusetts, New York, California, and Illinois already accomplishes this result, with civil and criminal liability for discrimination on the basis of national origin.

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260. Summers, *supra* note 62, at 853–54, 854 n.31. Earlier theorists had posited much the same kind of system within the criminal context. See Fiona Doherty, *Obey All Laws and Be Good: Probation and the Meaning of Recidivism*, 104 GEO. L.J. 291, 295 (2016) (arguing that “like plea bargaining, probation is a shadow system of law enforcement and adjudication that actually drives how the criminal justice system operates in practice”).

261. This concern, of course, is in addition to the numerous other normative problems with such systems, detailed by Summers. See Summers, *supra* note 62, at 910–12.

262. *Id.*

263. Nicole Summers, *Eviction Court Displacement Rates*, 117 NW. U. L. REV. 287, 293 (2022).

264. Massachusetts law generally requires that execution not issue in a summary process action earlier than ten days after the entry of judgment. See MASS. GEN. LAWS ch. 239, § 5 (2023); MASS. UNIF. SUMMARY PROCESS R. 13. Thus, in Massachusetts, courts should not allow execution pursuant to motion any sooner than the general provisions of Section 5 of Chapter 239—ten days.

265. See, e.g., MASS. GEN. LAWS ch. 239, §§ 9–10 (2023) (providing for equitable stays of execution).

Massachusetts law prohibits discrimination on the basis of national origin.<sup>266</sup> Further, threats to call ICE in an attempt to recoup funds may constitute a violation of Massachusetts nondiscrimination law, in addition to extortion.<sup>267</sup> Similarly, New York City's Human Rights Law<sup>268</sup> (NYCHRL) prohibits discrimination by housing providers on the basis of national origin.<sup>269</sup> California's Immigrant Tenant Protection Act<sup>270</sup> prohibits landlords from "threaten[ing] to disclose information regarding or relating to the immigration or citizenship status of a tenant, occupant, or other person known to the landlord to be associated with a tenant or occupant."<sup>271</sup> Illinois's Immigrant Tenant Protection Act<sup>272</sup> prohibits landlords from threatening to disclose immigration information to "harass[] or intimidate" the tenant, "influenc[e] the tenant to surrender possession" or use immigration status as the basis for an eviction action.<sup>273</sup> Colorado passed a similar statute that went into effect in 2021.<sup>274</sup>

The legislative history of these laws makes clear that the legislators felt concerned not only about the debtors, but also their families and communities.<sup>275</sup> Such constraints on landlords' ability to threaten harsh remedies like deportation make compelled redemption much less likely.

Crucially, the remedies available under these statutes should not rely on tenants raising the violation as a claim or counterclaim. Though the court can award damages of six months to a year of rent,<sup>276</sup> undocumented tenants may hesitate to use the court system to vindicate their rights. California partially solved this problem by giving nonprofits standing to seek injunctive relief for Immigrant Tenant Protection Act violations, both within eviction actions and in standalone cases.<sup>277</sup>

Nonprofit and executive involvement may be needed to fully address the spillover effects of creditor threats to deport. *First*, state prosecutors may be

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266. MASS. GEN. LAWS ch. 151B, § 4(6)(b) (2023).

267. As of November 2023, the complaint filed by the Commonwealth is pending in Massachusetts Superior Court, having been transferred there from the Northeast Housing Court. *See Commonwealth v. Wang*, No. 2284-CV-01848 (Mass. Sup. Ct.).

268. N.Y.C. ADMIN. CODE § 8-107(5) (2023).

269. *Id.*

270. *See* Assemb. B. 291, 2017 Reg. Sess. (Cal. 2017).

271. CAL. CIV. CODE § 1940.2(a)(5) (West 2023); *see also id.* §§ 1940.3, 1940.35 (regulating inquiries and disclosures by landlords and the government into the immigration status of tenants).

272. 765 ILL. COMP. STAT. 755 (2023).

273. *See id.* at 755/10.

274. *See* COLO. REV. STAT. §§ 38-12-1201 to -1205 (2023).

275. *See, e.g.,* CAL. SEN. JUDICIARY COMM. REP., Assem. B. 291 (Chiu), 2017–2018 Reg. Sess., at 7 (Cal. 2017) (recounting a pediatrician's story that an undocumented family, threatened with deportation, had to live in an apartment infested with cockroaches, one of which crawled into a six-year-old child's ear); ASSEMB. COMM. ON PRIV. & CONSUMER PROT., Assem. B. 291 (Chiu), 2017–2018 Reg. Sess., at 9 (Cal. 2017) (recounting how landlord threatened to call ICE on a family with a ten-month-old daughter when they complained about the lack of heat, hot water, and smoke detectors).

276. *See* CAL. CIV. CODE § 1940.35(b)(1) (West 2023).

277. *See id.* § 1940.35(h). Illinois and Colorado did not adopt this provision. *See* COLO. REV. STAT. § 38-12-1205 (2023); 765 ILL. COMP. STAT. 755 (2023).

needed to enforce the antidiscrimination, civil rights, and immigrant tenant protection statutes. *Second*, ICE should discard tips that appear to be debt collection tactics. *Third*, state courts should preserve a formal separation between debt collection cases, including eviction actions, and federal immigration enforcement.

#### CONCLUSION

Harsh creditor remedies are bad for many reasons. One reason is that they have the likely—and often intended—effect of forcing redeemers to jump to the rescue. Although private acts of charity should be expected and encouraged, giving creditors such devastating tools turns acts of grace into acts of compulsion. Cabining that spillover effect is crucial to preserving the fundamental nature of civil law as we know it.